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NO. 87 -

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

LIST OF PARTIES

PETITIONER

THOMAS K. GILHOOL, Secretary of Education of the Commonwealth of Pennsylvania

RESPONDENTS

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH

THE CENTRAL BUCKS SCHOOL DISTRICT

DR. THOMAS L. NEWMAN, Superintendent of the School District

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Thomas K. Gilhool, Secretary of the Pennsylvania Department of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported but may be found in the appendix. (Pet. App. 1a).

The District Court opinion of June 2, 1986 is reported at 646 F.Supp. 280 (E.D. Pa. 1986) and may be found in the appendix. (Pet. App. 83a).

The District Court opinion of August 28, 1986 has not been reported but may be found in the appendix. (Pet. App. 112a).

The District Court opinion of February 20, 1987 has not been reported but may be found in the appendix. (Pet. App. 191a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on January 29, 1988. (Pet. App. 1a). This petition is filed within ninety days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ...

U.S. Const. Amend. XIV, Sec. 1.

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV, Sec. 5.

STATUTE INVOLVED

20 U.S.C. §1400. Congressional Statements and Declarations

...

(b) Findings

The Congress finds that -

...

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

§1415. Procedural Safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall

establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to -

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State,

including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational

unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction;
attorneys fees

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the

records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

...

(4)(G) The provisions of subparagraph (F) [describing situations when the court shall reduce attorneys fees awarded under this section] shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

STATEMENT OF THE CASE

1. This case arises out of a dispute over the appropriate educational program for a gifted handicapped child. Respondent Russell A. Muth, Jr., alleged that his son, Robert Alexander Muth ["Alexander"], was denied a "free, appropriate public education" in violation of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq. (the "Act" or "EHA"). (Pet. App. 141a).

The defendants were the Pennsylvania Secretary of Education;[1] the Central Bucks (Pennsylvania) School District,

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[1]The original defendant was Secretary Robert C. Wilburn, sued only in his official capacity. His current successor in office is Thomas K. Gilhool, the petitioner in this Court.

and Dr. Thomas L. Newman, Superintendent of the School District. (Pet. App. 1a-8a).

2. Alexander, already diagnosed as learning disabled, first enrolled in the Central Bucks School District in 1980 where an individualized educational program [IEP] placed him in a learning disability resource room for some subjects and mainstreamed, or placed him in regular classes, for other subjects. Changes in Alexander's IEP were made with Muth's participation and approval until June 1983 when the School District proposed a change in Alexander's 1983-84 IEP to return the child to the learning disabled classroom setting for all substantive subjects. (Pet. App. 9a-11a).

Muth disagreed with the School District's proposal, requested a due process hearing and requested that no change be made in Alexander's current placement until a hearing was held. In September 1983, Muth enrolled Alexander in a private school in Massachusetts for learning disabled students.[2] (Pet. App. 13a).

The due process hearing was held on September 30, 1983 before a hearing officer who, on October 31, 1983 made recommendations, which included changes

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[2]Alexander remained at that private school until April 1985 when he was transferred by his father to Wyncote Academy, a private school in Pennsylvania with no special education program. At the beginning of the academic year 1986-87, Alexander returned to the Central Bucks School District.

in the IEP proposed by the School District, but did not order that Alexander be placed in a private school as Muth had requested. Both Muth and the School District appealed the hearing officer's decision to the Secretary of Education who remanded the case to the hearing officer with instructions to the School District to revise the IEP. The revised IEP was presented to the hearing officer, but Muth raised objections and on July 25, 1984 the hearing officer decided that the modified IEP was an appropriate program of education for Alexander.

Muth's appeal to the Secretary followed, and on October 24, 1984 the Secretary affirmed the hearing officer's decision. While these administrative proceedings were underway, Muth filed

suit in federal district court. (Pet. App. 13a-17a).

3. In the district court, Muth claimed that the IEP proposed by the School District for 1983-84 would not have provided Alexander with an appropriate education and that the administrative procedures adopted by Pennsylvania for contesting an IEP did not comply with the Act. He sought tuition reimbursement, declaratory and injunctive relief and attorneys fees. The district court initially held that the Eleventh Amendment barred Muth's claim for monetary relief against the Secretary of Education, but left open the question of injunctive relief and the question of monetary relief against the remaining defendants. (Pet. App. 167a).

By memorandum opinion and order of June 2, 1986, the District Court held that Pennsylvania's statutory scheme for providing parents of handicapped children with administrative process violates the provisions of the EHA. More specifically, the District Court held:

> (1) that Pennsylvania's initial hearing and review are both conducted at the state level in contravention of federal law, (Pet. App. 90a-95a);
>
> (2) that even if the initial hearing were a local one, a remand by the Secretary to the hearing officer violates the finality requirement of federal law, (Pet. App. 102a-104a); and
>
> (3) that because the Secretary must be considered an employee of Pennsylvania's state educational agency, he is an improper reviewing officer under federal law. (Pet. App. 101a-102a).

The District Court did not resolve the issue of tuition reimbursement, stating that it would hold a hearing to determine whether the IEP which the school district had proposed would have provided the minor child with an appropriate free education. (Pet. App. 108a). Prior to trial, the district court advised the Secretary that it would reconsider whether the Eleventh Amendment presents a jurisdictional bar to an award of money damages against the Secretary.

4. After a bench trial, the District Court issued an opinion and order on August 28, 1986, holding that the IEP prepared by the School District for the 1983-84 school year would have afforded Muth's son an appropriate education. (Pet. App. 156a) However, in light of the procedural violations

previously found, and without any finding of substantive due process deprivations, the District Court held that Muth was entitled to reimbursement for one year's private school expenses for his handicapped child. (Pet. App. 166a). The District Court further held that the EHA abrogated the Eleventh Amendment immunity of the states; consequently, the Secretary, sued in his official capacity, was found to be jointly and severally liable with the School District for the reimbursement award made to Muth. (Pet. App. 174a-177a; 187a-188a). In an opinion filed on February 20, 1986, the District Court awarded Muth attorney's fees to be paid jointly by the Secretary and the School District. (Pet. App. 210a-212a).

5. The parties cross-appealed to the Court of Appeals for the Third Circuit, which affirmed the District

Court in relevant part. (Pet. App. 4a-5a). More particularly, the Court of Appeals held: (1) that the Secretary of Education is an "employee" of an agency involved in the education of the child and thus is precluded, by the provisions of 20 U.S.C. §1415(c), from deciding administrative appeals involving issues of special education placements (Pet. App. 49a); and (2) that the EHA abrogated the states' Eleventh Amendment immunity.[3] (Pet. App. 77a-78a).

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[3]The Court of Appeals affirmed the District Court's holdings that the child's IEP was appropriate, and that remand from the Secretary to the hearing examiner violates the finality requirement of 20 U.S.C. §1415(c), but saw no need to reach the issue whether Pennsylvania's two-step hearing and review procedure conforms to federal law. These issues are not raised here. (Pet. App. 49a-58a).

The Secretary's petition for rehearing en banc was denied. He seeks review from this Court on the issues of the Eleventh Amendment and the bar to his hearing special education appeals under the EHA.

REASONS FOR GRANTING THE WRIT

1. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE EDUCATION FOR ALL HANDICAPPED ACT CONTAINS LANGUAGE WHICH CONVEYS CONGRESS' CLEAR INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

In a long line of cases, this Court consistently has interpreted the Eleventh Amendment to preclude suits against a state in federal court by citizens of that state or other states. Welch v. State Department of Highways and Public Transportation, ___ U.S. ___, 107 S.Ct. 2941 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651, (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279

(1973); Parden v. Terminal R. Co., 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman v. Jordan, supra, as well as suits seeking equitable relief, Alabama v. Pugh, 438 U.S. 781 (1978). A state may consent to suit against it in federal court, thereby waiving its immunity, but Pennsylvania has specifically withheld consent. 42 Pa.Cons.Stat. §8521(b); Pennhurst, 465 U.S. at 103 n. 12. In the absence of consent, a suit against the state or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 465 U.S. at 100.

Moreover, the Eleventh Amendment is a complete bar to suit against a Commonwealth of Pennsylvania official who is sued, as the Secretary of Education is sued here, in his official capacity. Ex Parte Young, 209 U.S. 123 (1908). Although this Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 465 U.S. at 104 n. 13,[4] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. at 666-667.

a) In this case, the Court of Appeals for the Third Circuit has misapplied the decisions of this Court

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[4] Edelman v. Jordan, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

when it held that Congress, by enacting the EHA pursuant to §5 of the Fourteenth Amendment, has abrogated the states' Eleventh Amendment immunity to suit. (Pet. App. 71a-72a). The Secretary concedes that Congress has the power to abrogate the states' Eleventh Amendment immunity without the states' consent when it legislates to enforce the substantive provisions of the Fourteenth Amendment; however, there must be unequivocal evidence of such abrogation before it can be assumed to exist. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Parden, supra. The Court has traditionally required such intent to be either explicit in the statute or plainly evident from legislative history. Quern v. Jordan, 440 U.S. 332, 345 (1979).

In Quern, the Court reaffirmed the holding in Edelman v. Jordan, supra,

that the Civil Rights Act of 1871, 42 U.S.C. §1983, does not abrogate the states' Eleventh Amendment immunity despite the Act's clear intent to vindicate individual rights protected by the Fourteenth Amendment. Certainly the rights Congress sought to protect by the passage of the Civil Rights Act are as constitutionally compelling as the right to equal education which is being advanced by the EHA, yet Congress did not abrogate the states' immunity in 1871 and it is suggested that it has not done so in the EHA.

The Third Circuit's conclusion that, in enacting the EHA, Congress abrogated the states' constitutionally granted immunity, fails to satisfy the stringent criteria recently defined by this Court in Scanlon, supra. There, the Court refused to find such abrogation of immunity in Congressional passage of the

Rehabilitation Act, 29 U.S.C. §974[5] and announced that it will look no further than the four corners of a statute to discern congressional intent to abrogate state sovereign immunity. The Court said:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to

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[5]The statute at issue in Scanlon is similar to the statute at issue here. Both provide a private right of action for prospective relief for all aggrieved parties and neither explicitly provides a damage remedy or other retroactive relief. Both involve programs through which states receive federal assistance.

> temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute.

473 U.S. at 242 (citations omitted).

Because abrogation of state immunity alters the "constitutionally mandated balance of power between the States and the Federal Government," Scanlon, id. (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985) (Powell, J., dissenting)), the Court emphasized that an unusually high standard of certainty of Congress' intent is required to strip the states of their immunity before it will permit lower courts to upset this

balance. The Scanlon approach "ensures such certainty". 473 U.S. at 243. This unusually strict rule of construction is necessary to guard against expansion of federal court jurisdiction by judicial interpretation and to ensure that lower federal courts will not misinterpret the intent of Congress at the expense of the federal system. Id.

Although Congress has the power to override Eleventh Amendment immunity, it does not necessarily mean that it exercised such power in enacting the EHA. In fact, all indicia are to the contrary; there is no reference, either in the language of the statute itself or in the legislative history, that Congress intended this statute to abrogate rights reserved to the states by the Eleventh Amendment. Undeterred

by the standard of clarity required by this Court in Scanlon, the Third Circuit found Congress's "unmistakenly clear" intent to abrogate the effect of the Eleventh Amendment in the preamble of the EHA:

> ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. §1400(b)(9) (emphasis supplied). (Pet. App. 72a).

The Court of Appeals found additional support for its holding in the following statutory language:

> any party aggrieved by the findings and decision [made in the administrative process] shall have the right to bring a civil action ... in any State court of

> competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. §1415(e)(2). (Pet. App. 73a-74a).

Finally, the Third Circuit relied on the 1986 amendment to §1415(e) which provides for counsel fees in certain circumstances and in which Congress notes that certain provisions in the amendment shall not apply if "the court finds the state or local educational agency unreasonably protracted the final resolution of the action..." 20 U.S.C. §1415(e)(4)(G). (Pet. App. 76a).

On this meager basis, and despite the fact that the statute makes no mention of the Eleventh Amendment and nowhere states that Congress focused precisely on state liability to private

parties, the Third Circuit has discerned the abrogation of a sovereign state's immunity. In so doing, the Court of Appeals has swept aside, without so much as a passing glance, this Court's repeated admonition that the fundamental values of sovereign immunity will not be abrogated unless Congressional intent to do so is unequivocally and unmistakenly clear.

b) In arriving at its holding, the Third Circuit relied on the decision of a divided panel in David D. v. Darmouth School Committee, 775 F.2d 411 (1st Cir. 1985), which held that the EHA effectively abrogates the sovereign immunity of states. (Pet. App. 74a-75a).

In dissenting from his colleagues in the First Circuit, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 20 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent.

David D., 775 F.2d at 425.

Contrary to the position taken by the First and Third Circuits, three other Circuits have not found in the language of the statute that unmistakably clear congressional intent necessary to abrogate the immunity of the states. In Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1983), the Eighth Circuit rejected the contention that the passage of the EHA

abrogates states' immunity. Relying on the clear guidelines announced in Quern v. Jordan, supra, that court held that an intention to sweep away the immunity of states cannot be inferred from the mere fact that the EHA was passed pursuant to the Fourteenth Amendment, but that such an intent must be found in express formal abrogation language or persuasive legislative history.[6] The Miener court then dismissed all causes of action for damage relief against state officials, including relief in the form of compensatory educational services.

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[6]Miener pre-dates Scanlon and applies the less stringent standard found in Quern v. Jordan, which permitted the court in Miener to look at the legislative history as well as the statutory language.

Similarly, in Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986), the Seventh Circuit held that Congress did not abrogate the Eleventh Amendment immunity of the states by enacting the EHA pursuant to §5 of the Fourteenth Amendment and reversed a reimbursement award which had been made against state officials. 796 F.2d at 945.

Finally, in Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), the Ninth Circuit was faced with an appeal from an order of the district court denying damage claims against the California Superintendent of Education. Although the district court found that state policy violated the student-plaintiff's rights under the EHA, it held that declaratory and injunctive relief were appropriate but that the Eleventh Amendment barred

monetary damage relief against the state. The Court of Appeals specifically held that application of the Scanlon standard to the EHA compelled the conclusion that Congress had not abrogated the states' Eleventh Amendment immunity. 793 F.2d at 1492-94.

In its opinion below, the Third Circuit points to the 1986 amendment to §20 U.S.C. §1415(e) to bolster its conclusion, noting that the decisions of the Seventh, Eighth and Ninth Circuits pre-date that amendment and, consequently, their reasoning and conclusion are no longer tenable. (Pet. App. 76a). The subject matter of that amendment, however, is attorney's fees; the amendment says nothing about state liability to private parties and does not in any way expand the category

of litigants who may sue the states for damages.

The fact that Congress has provided for attorney's fees in actions pursuant to the EHA is perfectly consistent with the states' Eleventh Amendment immunity from suit under that statute.

Attorney's fees are claims for equitable relief, and it is clear that immunity from damages does not ordinarily bar equitable relief. See Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). While this Court specifically has held that the Civil Rights Act does not abrogate the States' Eleventh Amendment immunity, it has also held that 42 U.S.C. §1988 authorizes attorney's fees against state officials as part of the costs in §1983 actions. Hutto v. Finney, 437 U.S. 678, 693 (1978).

Therefore, an amendment to the EHA providing for attorney's fees adds nothing to the Third Circuit's position that the EHA abrogates the immunity of the states to be sued in federal court.

Finally, Congress knows full well how to make clear its intent to remove Eleventh Amendment protection. See Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, §1003(a)(1) (1986). ("A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of [enumerated statutes].") In fact, the language used in the Rehabilitation Act Amendments is particularly significant since it was employed specifically to overrule the decision in Scanlon.

In enacting the EHA amendment in 1986 Congress certainly was aware of the decisions of the Seventh, Eighth and Ninth Circuits which did not find abrogation of states' immunity; at that point, Congress could have expressed its intent to abrogate the States' immunity to suit, just as it has done in the Rehabilitation Act Amendment. The fact that Congress did not expressly and unmistakably express that intent compels the conclusion that there was no such intent.

Neither the language of the statute nor its 1986 amendment provide one shred of evidence that Congress intended to sweep away the States' immunity when it enacted the EHA. Without such a clear expression of intent, the Third Circuit's opinion must be rejected. At the very least, the conflict among the Circuits calls for this Court's review.

2. THE DECISION OF THE THIRD CIRCUIT, BASED ON AN ERRONEOUS INTERPRETATION OF THE EHA, WOULD GRAVELY DISRUPT EDUCATION FOR THE HANDICAPPED IN PENNSYLVANIA TO THE DISADVANTAGE OF THE HANDICAPPED.

The Third Circuit's decision also held that Pennsylvania's Secretary of Education is precluded from participating in the administrative procedures because the Secretary is not an "impartial" reviewing officer as required by 20 U.S.C. §1415(c). (Pet. App. 48a-49a).

This holding ignores the central role which Congress has assigned to the state's chief educational executive, is detrimental to the proper administration of the EHA, and is not supported by this Court's and other courts' interpretation of "impartial".

a) This Court repeatedly has recognized that, because Congress based the EHA on the landmark decisions in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) [hereafter PARC], and Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.C. D.C. 1972), courts should look to those decisions in interpreting the Act. See Honig v. John Doe, 56 U.S.L.W. 4091, 4096 (Jan. 20, 1988); Board of Education v. Rowley, 458 U.S. 176, 192-94, nn. 15-16 (1982). The PARC case in fact established Pennsylvania's impartial due process hearing system as it exists today. The PARC consent decree placed the ultimate responsibility for the handicapped with the Secretary of Education and, thus,

mandated the Secretary's involvement in hearing decisions:

> The hearing officer shall be the Secretary of Education, or a person designated by him acting in his stead, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

343 F.Supp. at 279 (Amended Stipulation para. 3(1)). Unlike local school units, the Department of Education was considered both impartial and the designated police officer for the interests of the handicapped.

Thus, in striking down Pennsylvania's system for special education hearings, the Court of Appeals struck down as illegal under the EHA the very system on which the EHA was based.

It is clear that Congress's standard of impartiality has been misunderstood by the Court of Appeals. Transferring decision-making authority from the Secretary to hearing officers will not make a decision more impartial. Because a state retains the authority to hire a hearing officer for future decisions, a part-time hearing officer is hardly free from the pressure to conform his decisions with the views of the Department. The court's decision, therefore, does not achieve what it perceives as Congress's goals.

The impartiality Congress sought to achieve was not without consideration for economic constraints or educational perspectives, both of which are legitimate factors in a state's educational decision-making process.

Rowley, 458 U.S. at 207. Instead, Congress's standard of impartiality sought to assure only that the hearing not be conducted by someone closely associated with the very school officials whose educational plan a parent has rejected. Pennsylvania's Secretary of Education, the chief executive officer of a supervising state agency, lacks that close association with those who have formulated a plan rejected by the parents and is, therefore, a permissible reviewer.

b) Moreover, the Third Circuit's decision will damage education for the handicapped and therefore is contrary to congressional intent. This is so for several reasons.

First, the court's interpretation diminishes the authority and, therefore, the responsibility and accountablity

that Congress wished to place on state education departments. The EHA specifically provides that the state educational agency shall be responsible for assuring that the EHA's requirements are carried out. 20 U.S.C. §1412(6). The Act further charges states with the responsibility of "adopting, where appropriate, promising educational practices and materials." Policy guidelines are only a limited tool in implementing these responsibilities. Only by retaining ultimate control over individual decisions can the Secretary effectively implement desirable policies. For this precise reason, the plaintiffs in PARC recommended that: "The ultimate responsibility and authority to assure a free public education appropriate to the educational needs of each school aged mentally retarded child should lie with the

Secretary of Education." Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 93rd Cong., 1st Sess., Part 3, 1513 (1974) (prepared comments of Pennsylvania Association for Retarded Children). Indeed, in Rowley, supra, this mandated limited judicial review out of deference to the state's expertise in making decisions in the individual case. Id. at 207-08.[7]

Second, the decision below, if allowed to stand, will hinder the development of a coherent special education policy. As the Court noted in Rowley, special education decisions are primarily decisions of educational

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[7]In Rowley, the ultimate education decision to which the Supreme Court deferred had been made by New York's Commissioner of Education.

policy. Transferring final reviewing authority from the Secretary to temporary hearing officers will lead to conflicting decisions. Divorcing the decision of an individual child's program from the state's general policy-making and program development will disrupt the harmony between program development and orders to local schools in individual cases.

c) In arriving at its decision, the Court of Appeals relied on Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), which held that the statutory term "impartial review" precluded the use of Delaware State Board employees from participating as review officers. (Pet. App. 43a). Such reliance on Grymes is clearly misplaced for the simple reason that the Secretary of Education is a high public official

appointed by the Governor in accordance with the provisions of the Constitution of the Commonwealth, 71 P.S. §67.1(d)(1), whose function is to establish and implement statewide educational policy; he is far removed from the individual disputes that arise between parents and local school districts which are directly involved in the education of the child. The nature of the Secretary's function also distinguishes this case from Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291, cert. denied, 455 U.S. 946 (1982) (members of the local educational board may not conduct impartial due process hearings because they are employees of the local educational agency), (Pet. App. 43a) and from dictum in Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983),

(the ban on review by an employee of the agency involved in the education of the child extends to the second level of administrative appeal), (Pet. App. 44a).

In another appellate decision relied upon by the Third Circuit, Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir. 1980), the Eighth Circuit held that the Iowa Superintendent of Public Instruction was an employee of the educational agency involved in the education of the child, albeit indirectly, and hence could not provide the impartial review required by the statute. (Pet. App. 45a). See also Vogel v. School Board of Montrose, 491 F.Supp. 989 (W.D. Missouri) (Deputy Commissioner of Education deemed an employee of an agency involved in the education of the child, consequently not

an impartial reviewer). (Pet. App. 46a-47a).

Reaching a conclusion contrary to that of the Third and Eighth Circuits, the Eleventh Circuit Court of Appeals dismissed as frivolous the argument that the Florida Commissioner of Education could not conduct a review of the due process hearing. Victoria L. by Carol A. v. District School Board, 471 F.2d 369 (11th Cir. 1984). (Pet. App. 48a). Similarly, in Brandon v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740 (E.D. Wis. 1984), the district court held that, since the Superintendent of Public Instruction is a constitutional officer of the State of Wisconsin, he was qualified to sit as an impartial hearing officer. (Pet. App. 47a). While the Third Circuit acknowledged these cases, it did not

find them persuasive, (Pet. App. 48a), adopting the rationale that while the Secretary may not technically be an "employee" of the Department of Education, the Secretary's exercise of both fiscal and regulatory control over the school districts contravenes Congress' intent that the reviewing officer be impartial. (Pet. App. 49a).

The Court of Appeals' conclusion misconstrues the concept of impartial review. It ignores this Court's admonition that administrative adjudicators enjoy "a presumption of honesty and integrity," Withrow v. Larking, 421 U.S. 35, 47 (1975), that is not overcome merely by showing that they occupy one position or another in the governmental hierarchy. Such a presumption can be overcome only by a

risk of "actual bias or prejudgment," ibid, and there is no suggestion in this record of any such thing.

The holding of the Third Circuit interpreting the concept of "impartiality" effectively defeats the very administrative procedure which Congress intended the states to establish and should be reversed.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted and, upon review, the decision of the Court of Appeals should be reversed.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 86-1605, 86-1610, 86-1629,
87-1130, 87-1134, 87-1159

MUTH, JR., RUSSELL A.,
INDIVIDUALLY AND AS NEXT FRIEND
OF MUTH, ROBERT ALEXANDER

vs.

CENTRAL BUCKS SCHOOL DISTRICT,
DR. NEWMAN, THOMAS L., Superintendent
of the Central Bucks School District
and MARGARET A. SMITH, SECRETARY OF
EDUCATION, COMMONWEALTH OF PENNSYLVANIA

Russell A. Muth, Jr.,
Appellant Nos. 86-1605, 87-1159

Margaret A. Smith, Secretary of
the Pennsylvania Department
of Education,
Appellant Nos. 86-1610, 87-1134

Thomas L. Newman and Central
Bucks School District,
Appellants Nos. 86-1629, 87-1130

On Appeal From The United States
District Court For the Eastern
District of Pennsylvania
(D.C. Civil No. 84-2032)

Submitted Pursuant to Third Circuit
Rule 12(e)
September 2, 1987

BEFORE: WEIS, STAPLETON, and VAN DUSEN,
Circuit Judges

(Opinion filed January 29, 1988)

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

At issue in this appeal are alleged procedural and substantive violations of the Education of the Handicapped Act, 20 U.S.C. §§1401-1415 (1982) (EHA or the Act), as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-172. The district court held that the procedures devised by the State of Pennsylvania for complying with the conditions on which the EHA provides federal funding for the education of

handicapped children available to states did not meet EHA requirements. The court then held plaintiff entitled to reimbursement for expenditures he made for his handicapped son's tuition at a private school for the 1983-84 academic year. The court did not, however, grant plaintiff an order directing defendants to place plaintiff's son in a private school for the academic year 1986-87 and thereafter. Plaintiff was awarded partial reimbursement of the attorneys' fees he incurred in connection with this lawsuit. As the district court found that the EHA abrogated eleventh amendment state immunity, the State of Pennsylvania was held joint and severally liable for the awards to plaintiff. We will affirm the judgment of the district court on every issue except its determination of the amount

of attorneys' fees to which plaintiff is entitled. On that issue, we will remand for further proceedings.

I.

Plaintiff, Russell A. Muth, Jr., is the parent of Robert Alexander Muth ("Alexander"), a bright child with a language learning disability and associated emotional problems. There is no dispute that Alexander is "handicapped" within the meaning of the EHA, 20 U.S.C. §1401(a)(1) (1976 & 1987 Supp.) and is an "exceptional" child under 22 Pa. Code §§13.1 and 341.1. Accordingly, the EHA requires that Pennsylvania, in return for its receipt of federal funding under the Act, provide Alexander with a free appropriate public education. 20 U.S.C. §1412(1). Alexander's education must be

tailored to his unique needs by means of an individualized educational program (IEP).[1] 20 U.S.C. §§1401(18), 1414(a)(5).

The EHA also requires that Pennsylvania establish procedural safeguards to protect the interest

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[1]An IEP is a comprehensive plan of the educational program a child is to follow. It is developed by school officials, specialists in the education of handicapped children, and teachers, working with the parents or guardians and, where appropriate, the child. The IEP states, among other things, the objectives of the child's program, the child's educational needs, the services to be provided by the school, and criteria for evaluating the child's progress. IEPs are subject to review and revision at least annually. 20 U.S.C. §1401(19); 34 C.F.R. §§300.346, 300.343(d); 22 Pa. Code §§341.15, 341.17.

of a child such as Alexander in receiving a free appropriate public education. Not only does the parent of such a child have the right to participate in developing the child's IEPs, but the parent may challenge in administrative hearings and in court a proposed IEP which he or she believes provides the child with a lesser education than appropriate. Furthermore, the parent of a handicapped child may challenge conduct or the educational agency which the parent feels has infringed his or her procedural rights. In this case, Muth has claimed both that Alexander was denied an appropriate education and that Pennsylvania's procedures violate rights guaranteed by the EHA and the federal regulations promulgated to supplement the Act, 34 C.F.R. §§300 et seq.

(1987). In addition to pursuing these claims in administrative hearings pursuant to the Pennsylvania procedures that implement the EHA, 22 Pa.Code §§13.31 et seq., Muth has brought this suit against the Central Bucks School District (the "School District") and the Secretary of Education of the Commonwealth of Pennsylvania (the Secretary").[2]

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[2]Dr. Newman, the Superintendent of the Central Bucks School District, was initially named by Muth as a defendant as well. However, the suit against Newman was dismissed on the ground that Newman was entitled to immunity under the standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982) (official is immune if did not violate statutory or constitutional rights of which a reasonable person would have known). This dismissal is not challenged on appeal.

Alexander first attended Central Bucks schools in 1980.[3] By this time, Alexander's learning disability had already been diagnosed: consequently, when Alexander was enrolled in elementary school for the 1980-81 school year, the School District formulated an IEP for him. Under the IEP, Alexander was placed in a learning disability resource room class, where he received small group and one-on-one instruction and speech and language therapy. He was mainstreamed, or placed in regular classes, for art, music,

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[3]Prior to this time, Alexander had lived with his mother in Colombia, South America. He had there had three years of schooling, and had spoken Spanish almost exclusively. When he came to live with his father in Pennsylvania. Alexander was 10 years old.

physical education, library, lunch, and recess. Muth approved this initial IEP, as well as revisions made in it in February of 1981. The School District and Muth were also able to agree on an IEP for Alexander for his final year in elementary school, academic year 1981-82, and his first year of junior high school, academic year 1982-83. Improvements in Alexander's scores on various tests indicate that he made considerable educational progress during this time.

At this point, however, Alexander began expressing a desire to be placed in regular classes rather than in classes for learning disabled students. At Muth's request, the School District agreed to mainstream Alexander for English and science, on a trial basis, beginning in March of 1983. During that

month, the School District prepared a proposed IEP for the 1983-84 school year that retained Alexander's placement in the district and included mainstreaming in English and science.

Mainstreaming was not very successful, and on June 17, 1983 an IEP conference was held by the School District to consider various changes in Alexander's program. Muth was in attendance. The main recommendation which emerged from this conference was that Alexander be returned for all substantive subjects to the more restrictive setting of a learning disabled classroom. The School District's proposal was to be embodied in a new IEP to be developed over the summer and implemented in the 1983-84 school year.

Muth, dissatisfied with the School District's planned program for Alexander, requested that a due process hearing be held on the question of whether the School District was providing an appropriate education to Alexander. The School District received this request on June 20, 1983. Muth further requested that no change be made in Alexander's current program until such a hearing had been held.[4]

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[4]Such a request from a parent is a legal bar against any change in the child's placement under 22 Pa.Code §13.32(22). Pennsylvania law is required to include this provision by 20 U.S.C. §1415(e)(3) and 34 C.F.R. §300.513(a). The School District therefore refrained from revising Alexander's IEP to reflect the June, 1983 recommendations.

Before the fall of 1983, Muth decided to enroll Alexander at the Landmark School, a private school in Massachusetts for learning disabled children. Alexander started at Landmark in September of 1983, and spent the 1983-84 academic year there. Alexander also spent most of the 1984-85 academic year at Landmark, but transferred in April of 1985 to Wyncote Academy,[5] for reasons which are not entirely clear. Alexander returned from Wyncote to the Central Bucks school system at the start of academic year 1986-87.

Muth's due process hearing was held on September 30, 1983 before Hearing

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[5]Muth has not requested that he be reimbursed for tuition for the time Alexander spent at Wyncote, which has no special education program.

Officer Vernard Trent.[6] At this hearing, the School District presented its March, 1983 IEP. While the School District's June recommendations were placed into evidence, they apparently had never been incorporated into a new IEP. Muth, acting as his own attorney, made various objections to the School District's proposed programs.

Trent handed down his decision on October 31, 1983; he held that the

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[6]Normally, Pennsylvania law requires the initial due process hearing to be held within 30 days of receipt by the Pennsylvania Department of Education of the parent's request, 22 Pa.Code 13.32(10). Under the same provision, however, a parent may request and receive extensions of these time limits. In this case, the extra delay was largely, if not entirely, due to Muth's own requests for postponement of the hearing. See App. at 285.

School District's current 1983-84 IEP, which still included the mainstreaming for English and science, was inappropriate. Trent also made a set of recommendations: that the School District should consider whether Alexander should be in a more restrictive placement; that the School District chould address Alexander's auditory disability; and that the School District, considering Alexander's giftedness, should provide Alexander with additional special activities and services. Trent did not order that Alexander be placed in a private school offering a program similar to Landmark's, as Muth had requested, nor did he find that the School District was unable to provide Alexander with an appropriate education.

Both Muth and the School District appealed from Trent's decision. Pursuant to 22 Pa.Code §13.32(24), the appeal was submitted to the Secretary. On January 23, 1984, the Secretary decided to remand the case to Hearing Officer Trent, with instructions to the School District to revise the IEP for Alexander to include, inter alia, the June, 1983 recommendations and to then present the revised IEP to Trent. The School District, working with Muth, proceeded to revise the IEP.

On June 7, 1984, the School District presented to Trent its revised IEP, dated May 1, 1984, and Muth presented his objections to it. On July 25, 1984, Trent issued his decision that this modified IEP was an appropriate program of special education for Alexander, and that the School District was capable of implementing it. Muth again appealed to

the Secretary, and on October 24, 1984, the Secretary affirmed Trent's decision.

During the course of the above proceedings, on April 28, 1984, Muth filed suit in federal district court.[7] He claimed that the School District's IEP for Alexander was inappropriate under the EHA, and sought tuition reimbursement for 1983-84 and an order that the School District pay for Alexander to attend Landmark in future.[8] Muth was allowed to amend

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[7]Defendants' argument that Muth's suit in federal district court was improper as Muth failed to exhaust his administrative remedies did not prevail in district court and is not before us on appeal.

[8]Muth also alleged violations of §504 of the Rehabilitation Act, 29 U.S.C. §794 and of the equal protection and due process clauses of the 14th amendment via 42 U.S.C. §1983, but later amended his complaint to drop those claims.

his complaint to add a claim that Pennsylvania's due process procedures did not conform to the requirements of the EHA, 20 U.S.C. §1415, and on June 2, 1986, the trial court granted summary judgment to Muth on this procedural claim. Muth v. Smith, 646 F.Supp. 280 (E.D. Pa. 1986). The court also requested the School District to prepare an IEP for Alexander for the 1986-87 school year. In response, an IEP was prepared and submitted for the 1986-87 school year that was very similar to the IEP for 1983-84.

A trial was held in August of 1986 on the issues of the effect of the procedural flaws of the Pennsylvania statute and the appropriateness of the 1983-84 and 1986-87 programs offered to Alexander by the School District. The district court held that the School

District's IEPs for both years were appropriate, but that the procedural defects of Pennsylvania's administrative procedures "rendered the IEP inappropriate for 1983-84". Memorandum and Order of August 28, 1986, App. at 846. Accordingly, the court ordered judgment in Muth's favor for the 1983-84 tuition reimbursement. The court also awarded Muth the attorneys' fees incurred in pressing his arguments on the procedural violations and on the substantive sufficiency of the 1983-84 IEP. The judgment was entered against both the School District and the Secretary.

Muth appeals from the district court's judgment that the proposed 1986-87 IEP would provide Alexander with a free appropriate public education, and

again seeks an order directing that the defendants place Alexander in a private school with programs similar to Landmark's. Muth also challenges the district court's determination that the 1983-84 IEP was appropriate. The School District and the Secretary have filed cross-appeals challenging the district court's determination that Pennsylvania's administrative procedures violated federal law, that tuition reimbursement was an appropriate remedy, that the EHA abrogates Pennsylvania's immunity, and that the attorneys' fees award was proper.

II.

We first address Muth's contention that the 1983-84 and 1986-87 IEPs

proposed by the School District should have been found inappropriate. Under 20 U.S.C. §1415(e)(2), a district court is to determine whether a challenged IEP is appropriate based on a preponderance of the evidence. On review, we may overturn this factual decision only if we find clear error. Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3rd Cir. 1986), cert denied 107 S.Ct. 99 (1986). In this case, we conclude that the district court did not err in finding the IEPs appropriate.

As the Supreme Court commented in its first case involving interpretation of the EHA, Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 189 (1982), "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded

handicapped children."[9] In Rowley, the Court interpreted the EHA as requiring "no more than a basic floor of opportunity," id. at 201, consisting of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Id. at 203. The EHA

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[9]The Act does expressly define the phrase "free appropriate public education." Section 1401(18) provides that:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized educational program required under section 1414(a)(5) of this title.

does not require a program that maximizes a handicapped child's potential, id. at 197 n. 21, 199, but rather one which is "reasonably calculated to enable the child to receive passing marks and advance from grade to grade." Id. at 204. See also Board of Educ. of E. Windsor Regional School Dist. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986) (EHA "requires a plan likely to produce progress, not regression or trivial educational advancement"). The Court posed two questions to be answered by district courts in cases such as the one before us now:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational

> program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can required no more.

458 U.S. at 206-07. Muth's factual challenge is to the district court's affirmative answer to the second Rowley question.

There is ample evidence in the record to support the district court's carefully-reached conclusion that the 1983-84 and 1986-87 IEPs developed by the School District constituted a free appropriate public education for Alexander under the EHA as interpreted

by Rowley.[10] Among the factors considered by the district court were

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[10]Muth complains that he had no chance to participate in the development of the 1986-87 IEP. It is true that the 1986-87 IEP considered by the district court was prepared unilaterally by the School District at the court's request. However, this IEP was based on the 1983-84 IEP, which Muth participated in developing; on the June, 1983 recommendations, which Muth was also involved in developing; and on the recommendations of Hearing Officer Trent, who heard Muth's evidence and arguments. The reasons for the district court's request that the School District go ahead and draft a proposed IEP for the 1986-87 school year was so that the District would not have to start from scratch in developing an IEP for Alexander at the beginning of that year. In this way, the School District would be able to meet with Muth before or at the beginning of that academic year, and develop a final program with the requisite parental input. Muth does not claim that he was excluded from involvement in developing Alexander's IEP after August 28, 1986, when the decision of the district court holding the 1986-87 IEP appropriate was handed down. Accordingly, we find Muth has no ground for complaint on this score.

the School District's plan and its ability to make available to Alexander computer facilities, a variety of elective courses, one-on-one and small group instruction, mainstreaming for some classes,[11] and regular psychological counseling. Additionally, the district court considered the opportunity for Alexander, if he remained in the School District's

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[11] As the district court noted, there is a statutory preference for choosing the least restrictive placement appropriate for a handicapped child. 20 U.S.C. §1412(5)(B); see Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 695-96 (3d Cir. 1981) (recognizing preference but also recognizing that a residential program may be the only appropriate program for some severely disabled children). The School District's program, which includes some mainstreaming, would be less restrictive than the residential programs requested by Muth.

programs, to develop his relationship with his father and with his peers in the community. The district court heard evidence from a number of experts and educators, and compared the School District's programs with those offered by Landmark,[12] before concluding that the School District's proposed programs

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[12]Muth claims in particular that the trial judge clearly erred in finding that the multisensory approach of the School District, which emphasized visual instruction (Alexander's strength), was the same as the multisensory approach used by Landmark, which emphasized oral or phonetic instruction (Alexander's weakness). It appears that the two approaches, while very similar, do differ. However, the record supports the conclusion that the approach used by the School District was an appropriate one, which is all that is required by law. Therefore, even if the trial judge be understood as concluding that the School District's chosen method of instruction was identical to Landmark's, the error was harmless.

were appropriate.[13] We find no clear error in this conclusion, and therefore will not set it aside.

III.

The next issue presented for our review is whether the district court was correct in holding that the Pennsylvania statutory scheme for providing parents of handicapped children with due process violates federal standards. As this is

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[13] In this appeal, Muth raises for the first time the claim that Pennsylvania law goes beyond the federal minimum to set a higher substantive standard for the quality of the program which must be available to handicapped children. Appellant's Brief at 15. Because Muth did not make this argument before the district court, we decline to express an opinion on it.

a question of statutory construction, our review is plenary. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981).

The EHA allows states to choose to establish either a one-tier or two-tier due process hearing system for review of the appropriateness of a challenged IEP. In a one-tier system, an impartial hearing is conducted under the auspices of the state educational agency, and the losing party may appeal to the courts. In a two-tier system, an impartial hearing is conducted under the auspices of the local educational agency, and appeal may be taken to the state level and then to the courts. Because the exact language of the federal statute and regulations is important in determining whether Pennsylvania law is in compliance with federal requirements,

we set out the relevant parts of the EHA and the Code of Federal Regulations here despite their length. Under 20 U.S.C. §1415(b)(2):

> Whenever a complaint has been received under paragraph (1) of this subsection (requiring an opportunity for the parent to present complaints with respect to any matter relating to the child's education), the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Section 300.507 of the regulations amplifies this:

> (a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

Section 1415(c) provides that:

> If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency... any party aggrieved by the findings and decision rendered in such a hearing

may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Section 300.510 adds to this that:

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

...

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights

in §300.508 (to be represented by counsel, to present evidence, to cross-examine witnesses, and so forth) apply;

...

(c) The decision made by the reviewing official is final, unless a party brings a civil action under §300.511.

Under §1415(e)(1):

> A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) (allowing appeal to courts by any party who has no right to appeal under §1415(c)) of this subsection. A decision made under

subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

And under §300.511:

> Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under §300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under §300.510 has the right to bring a civil action under (§1415(e)(2)).

Finally, 34 C.F.R. §300.512 adds a stringent time limitation on these proceedings:

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) or (b) of this section at the request of either party. Thus, the federal scheme contemplates that a child and his or her parent who are dissatisfied with a proposed IEP will normally receive a final, impartial, judicially reviewable, administrative

decision within two and one-half months.

Under the system chosen by Pennsylvania to implement these federal requirements, whenever a school entity purposes (sic) to alter the educational status of a handicapped child, it must notify the parents of their "right to a placement conference with the school entity involved and of the right to a full hearing before the Secretary or the designee of the Secretary on the proposed action." 22 Pa.Code §13.32(2). If the conference does not resolve any dispute, the parent may request a due process hearing. §13.32(9). The request must be forwarded by the school district within 10 days to the Department of Education of the Commonwealth, a state agency headed by the Secretary. §1332(10). The Secretary, or his designee, then

assigns a hearing officer so that a hearing may be held no less than 15 days, and no more than 30 days, after the receipt of the request by the Department. §13.32(10), (12). The individual assigned by the Secretary or his designee may not be "an officer, employee, or agent of any school district or intermediate unit in which the person resides." §13.32(12). The hearing must be held in the school district involved. §13.32(11).

After the due process hearing, the hearing officer must render findings of fact and conclusions of law in no more than 20 days. §13.32(21). "The decision of a hearing officer may be appealed to the Secretary." §13.32(24). The district court also found as a fact that the statement of written procedures provided to parents refers to the hearing officer's report

as "Findings of Fact... and a list of recommended orders (recommendations) which the hearing officer believes the Secretary of Education should adopt." 646 F.Supp. at 283.

The district court held that Pennsylvania has elected to have the initial hearing and the review conducted at the state level and that this is a violation of federal law. The court also held that even if the initial Pennsylvania hearing were a local one, Muth would be entitled to summary judgment on his procedural claims because the Secretary's remand to Trent violated the finality requirement of federal law, and because the Secretary must be considered an employee of Pennsylvania's state educational agency and an improper reviewing officer. We address those issues in reverse order.

1. The involvement of the Secretary.

The EHA speaks of the due process hearing being "conducted by the State educational agency or by the local educational agency ... as determined by state law." §1415(b)(2). It also describes the "impartial review of such hearing" as being "conduct(ed)" by the state educational agency. §1415(c). However, the text of the statute, the regulations, and the legislative history establish that due process hearings and impartial reviews are, in actuality, to be conducted by individuals called "hearing officers" or merely "officers", e.g. §1415(c); §300.507, appointed by the agency under whose auspices the due process hearing or impartial review is held, and that it is these officers who are to be the decisionmakers. Section 1415(b)(2) provides that a due

process hearing, whether "conducted" by a local agency or a state agency, shall be presided over by an individual who shall not be an "employee of such agency." Section 1415(e)(1) provides that any "decision made in (such) a hearing shall be final" unless additional administrative or judicial review is permitted and sought.

Section 1415(c) speaks about review of the decision reached at the due process hearing where a state elects a two-tier system. It specifies that the review shall be conducted by an "officer" who is "impartial" and will make "an independent decision." Section 300.510 of the regulations, promulgated under the authority of §1415(c), allows the reviewing officer to hold a hearing and receive additional evidence, but provides that if a hearing is held it must conform to the requirements for

an initial due process hearing. Section 300.510 also requires that the decision of the reviewer be "final."

The regulations provide that "each public agency shall keep a list of persons who serve as hearing officers," §300.507(c), suggesting that each agency, local or state, is to do the appointing of the decisionmaker at its particular level.

The Conference Committee on the EHA made the thinking behind these provisions unmistakably clear in its Joint Explanatory Report:

> any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial officer since the State or local agency or intermediate unit will be a party to any complaint presented.... [N]o hearing may be conducted by an employee of the State or local educational agency involved in

> the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing.

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1502.

As the Secretary stresses, although the EHA expressly forbids employees of an educational agency from serving as hearing officers for due process hearings, §1415(b)(2), it does not contain a similar express prohibition with respect to officers assigned to conduct "impartial reviews." As we have noted, however, it does stipulate that such reviewing officers must be "impartial" and reach an independent decision. Given this fact, the ultimate objectives of the process, the

similarity of the responsibilities of due process hearing officers and impartial reviewing officers, and the above-quoted legislative history, we and most other courts addressing the issue have concluded that employees of a state educational agency may not be appointed to conduct an impartial review.

In Grymes v. Madden, 672 F.2d 321, 323 (3d Cir. 1982), this court held that service as state-level review officers by employees of the Delaware State Department of Public Instruction constituted a denial of impartial review. In Helms v. McDaniel, 657 F.2d 800, 806 n. 9 (5th Cir. 1981), reh'g denied 664 F.2d 291, cert. denied 455 U.S. 946 (1982), the Court of Appeals for the Fifth Circuit found that employees of the state educational agency could not conduct a review because "[a]s the legislative history

indicates, the impartiality demanded in the review proceeding cannot be achieved when the educational agency or one of its employees is in charge of the proceeding." Similarly, in Colin K. by John K. v. Schmidt, 715 F.2d 1, 5 n. 3 (1st Cir. 1983), the Court of Appeals for the First Circuit said that the "legislative history indicates that the prohibition against review by an employee of the agency involved extends to the second level of administrative appeal as well."

Having concluded that employees of the state educational agency may not conduct a review proceeding under §1415(c), we must next determine whether the Secretary of Education of the State of Pennsylvania is an employee of the state educational agency for purposes of the EHA.

In the Grymes case, the review officer was an employee of the Delaware Department of Public Instruction, see Grymes v. Madden, No. 79-55, Slip. Op. at 4 (D. Del. 1979), aff'd, 672 F.2d 321 (3d Cir. 1982), and not a state official of cabinet rank like the Secretary. The Secretary attempts to distinguish Grymes on this basis, relying upon caselaw in which the impartiality of a high state official was presumed in other contexts. E.g., Withrow v. Larking, 421 U.S. 35, 47 (1975). Several courts have taken a contrary view, holding that officials in positions similar to the Secretary's are to be considered employees of the state agency and unable to conduct the impartial reviews required by the EHA. In Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir. 1980), for example, the Iowa Superintendent of Public Instruction was

held to be an employee of the State Board of Public Instruction, Iowa's state educational agency, and thus unable to serve as hearing officer for the single state-level administrative proceeding provided by that state. The Superintendent had there contended that because he was not employed by the local agency, he was not employed by an agency involved in the education of the handicapped child; the court, however, took the view that the state agency was also involved in the education of the child, albeit indirectly. In Helms, supra, the court considered it "clear that the State Board (of Education) could not itself conduct the review." 657 F.2d 806 n. 9. And in Vogel v. School Bd. of Montrose, 491 F.Supp. 989, 995 (W.D. Mo. 1980), the Deputy Commissioner of Education was held to be an employee of the Missouri State

Board of Education and as such not allowed to serve as a state-level review officer. The Vogel court concluded that:

> Defendants' argument that the State Board of Education is not an 'agency or unit involved in the education or care of the child' pursuant to §1415(b)(2) because under the Missouri Constitution... the State Board is charged with "supervision of instruction", is untenable. Acceptance of the State defendants' interpretation would abrogate the intent of the statutory language in §1415(b)(2) and §1415(c), which is to ensure impartial review.

491 F.Supp. at 995.

There are two decisions that resolve the issue the other way. In Brandon E. v. Wisconsin Dep't of Public Instruction, 595 F.Supp. 740, 746 (E.D. Wisc. 1984), the Superintendent of Public Instruction, a constitutional officer of the state, was held not to be considered a school employee under the

EHA and not in any way precluded from conducting a review of the initial due process hearing. Similarly, in Victoria L. by Carol A. v. District School Bd., 741 F.2d 369, 374 (11th Cir. 1984), the argument that the Florida Commissioner of Education could not review the decision of the initial local hearing officer was held to be frivolous.[14] We respectfully disagree with these decisions.

In the EHA, Congress has indicated its desire to provide parents with decisionmakers who are not subject to the kind of pressures that employees of an educational agency would necessarily

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[14]The Tenth Circuit, in Cain v. Yukon Public Schools, 775 F.2d 15, 20 (10th Cir. 1985), noted the conflict between Grymes and Helms on the one hand and Victoria L. on the other, but did not address the issue as it had only been raised on appeal.

feel. The district court in this case, reasoning that the Secretary "directly exercises both fiscal and regulatory control over the school district and ... is at least involved in the education of handicapped children as were the employees of the Delaware Department of Public Instruction in Grymes," 646 F.Supp. at 283, held that the Secretary of Education must be considered the equivalent of an employee of Pennsylvania's state educational agency for purposes of the EHA. We agree with this reasoning and conclusion.

2. Finality

Muth did not receive a final decision until October 24, 1984, over a year after the School District received his request for a due process hearing (June 20, 1983) and the initial hearing

was held (September 30, 1983). The main reason for this delay was the Secretary's use of the remand procedure; rather than affirming or rejecting Trent's first decision in an appealable final order, the Secretary sent it back for another half year of proceedings. Additional time then slipped away during Muth's second appeal to the Secretary. Yet the Secretary argues that the remand procedure, since it is not specifically prohibited by federal law, is permissible.

While in many contexts the power to remand is inherent in the concept of appellate review, in the context of the EHA a remand following an "impartial review" is fundamentally inconsistent with the statutory scheme. As we have earlier noted, the EHA and its implementing regulations reflect the

importance not only of procedural protections but also of prompt resolution of disputes over the proper education of a handicapped child. Section 300.512 of the regulations, for example, imposes a stringent timetable that, absent reasonable requests for continuances, guarantees an administratively final and judicially reviewable decision no later than 75 days from the date of receipt of the request for a due process hearing. With respect to the "impartial review" proceedings, §300.512(b) specifically requires the state agency to "insure... [that] a <u>final</u> decision is reached in the review" within 30 days of receipt of the request for a review. (Emphasis supplied). The Secretary clearly violated this regulation by sending the case back to the due process hearing officer for further proceedings rather

than entering an appealable final decision. If the Act contemplated such action in this context, we are confident that §300.512 would have provided some time limitation on remand proceedings. In the absence of such a limitation we are unwilling to eviscerate the protection §300.512 does afford by sanctioning the Secretary's action.

3. Pennsylvania's scheme for hearing and review

The Secretary argues that the initial hearing is actually a local one because it is "conducted" by the school district, which is the entity that receives a parent's request for a hearing, schedules the hearing, and notifies the parent. Thus, in the Secretary's view, Pennsylvania has opted for a permissible two-tier system consisting of a due process hearing at

the local district level and "impartial review" at the state level. Alternatively, the Secretary argues that the federal law does not preclude a state-level hearing and a state-level review, maintaining that the provision for a single state-level decision procedure indicates that the drafters of the EHA felt that further review was not necessary when the initial hearing was conducted at the state level. As to achieving the speed and finality that are the objectives of the EHA, the Secretary argues, it matters little whether there is a local hearing and state-level review or whether there is a state hearing and state-level review. Thus, even if there is a conflict between Pennsylvania's statute and the federal law, the Secretary contends that it is only one of form, not substance,

and should be ignored on the ground that states are meant to have flexibility in creating procedures under the EHA.

Muth, supported by amicus curiae Pennsylvania Association for Children and Adults with Learning Disabilities, contends that the initial hearing is conducted by the state because the initial hearing officer, selected by the Secretary, is a state representative; a state-level review of a state-level hearing is impermissible, they argue, because the federal scheme envisions either one decision or two independent decisions at separate levels.

The district court understandably concluded that the decisionmaker was at the heart of the process and that the entity that "hired the hall" and made the other arrangements for the due process hearing was not as important.

It read the Pennsylvania Code provisions calling for the Secretary to assign the hearing officer and recognizing a right of parents to "a full hearing before the Secretary or the designee of the Secretary" as indicating that Pennsylvania's due process hearing occurs at the state level. In the district court's view, a system involving two decisions at the state level was in irreconcilable conflict with federal law.

If, as the district court suggests at one point based on the written procedures distributed to parents, Pennsyvlania treats the due process hearing examiner as a special master who makes recommendations to be accepted or rejected by the Secretary, its procedure clearly violates the federal requirements for a one-tier system since the hearing officer is not the final

administrative decisionmaker. Helms, supra, 657 F.2d 800, 805 (holding Georgia's provision that state reviewing officer's decision could be accepted or rejected by Georgia Board of Education violative of federal finality requirement). If, as the district court apparently concluded, the Pennsylvania system is more accurately described as a two-tier system consisting of a state-level due process hearing following by a state-level impartial review, there would appear to be a formal inconsistency with the federally required scheme even if the Secretary were not involved as a decisionmaker. Nevertheless, we would hesitate to invalidate the result of the Pennsylvania process solely on that ground since states are permitted under the federal scheme to create a process

taking up the time necessary for two tiers of proceedings and since review and decision by truly impartial individuals, by whomever designated, would result in independent decisions and thus would appear to constitute substantial compliance with the federal scheme.

We find it unnecessary, however, either to characterize the Pennsylvania system as a one- or two-tier system or to rule on whether a two-tier system conducted in its entirety on the state level is permissible. Given our holding that the Pennsylvania process afforded in this case violated federal law because of the Secretary's participation and the remand, we must affirm the district court's ultimate conclusion on the issue of compliance with the federal scheme. If our holding is not disturbed

by the Supreme Court, this will presumably mean that the Pennsylvania procedures will have to be revised in order for Pennsylvania to remain eligible for EHA funding. However, since there is no reason to believe that Pennsylvania will opt to set up a two-tier system in which both the due process hearing and the impartial review are conducted by state-designated officers, the validity of such a system, for present purposes, is purely hypothetical. Accordingly, we express no opinion on it.

IV.

The next issue is whether reimbursement for Alexander's 1983-84 tuition at Landmark was properly

ordered. In considering this issue we first note that a district court is authorized by 20 U.S.C. §1415(e)(2) to "grant such relief as the court determines is appropriate." The Supreme Court held in School Comm. of the Town of Burlington v. Dep't of Educ. of Massachusetts, 471 U.S. 359 (1985), that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy. In the course of reaching that conclusion, the Court observed:

> The statute directs the court to "grant such relief as [it] determines is appropriate." the ordinary meaning of those words confers broad discretion on the court. The type of relief is not further specified.... Absent other reference, the only possible interpretation is that the

> relief is to be "appropriate" in light of the purpose of the Act.

471 U.S. at 369. The Court concluded its opinion in Burlington with the comment that the statute's reference to "appropriate" relief meant that equitable considerations were relevant in fashioning relief under the EHA. Id. at 374.

Since Burlington, several courts of appeal have held that "appropriate" relief is determined by the equities of the case. See Jenkins v. Florida, 815 F.2d 629, 631 (11th Cir. 1987) ("Whether reimbursement is appropriate, and at what amount, should be determined by balancing the equities of the particular case"); Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 (5th Cir. 1986) (stating

various factors to be taken into account by district court in determining whether parent entitled to full or partial reimbursement for tuition expenses); see also McKenzie v. Smith, 771 F.2d 1527, 1535-36 (D.C. Cir. 1985) (listing factors weighed by district court in determining appropriate relief, and upholding that relief as properly granted).

The defendants acknowledge that a local school district, unsheltered by the 11th amendment, may be required to reimburse parents for the out-of-pocket expenses of alternative placement in cases where it is ultimately held that the IEP proposed by the school did not provide a free appropriate public education. They maintain, however, that reimbursement of such expenses is not authorized where the IEP is upheld and

the parents prevail only on a claim that they were denied the process required by the EHA. They assert that since the IEP in this case was ultimately sustained, the alternative placement of Alexander was not justified and the monetary award to Muth, in reality, was not reimbursement but a form of compensatory damages. In support of this contention defendants rely upon the following language from Burlington:

> [T]he Town repeatedly characterized reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the fist instance had it developed a proper IEP.

471 U.S. at 370-71.

While there is case law suggesting that compensatory damages based solely on violations of a parent's procedural rights may be available under the EHA,[15] we find it unnecessary to

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[15] In Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), for example, a reimbursement award was upheld where the school district had violated the EHA's notice provisions and had failed to develop an appropriate IEP; in the course of reaching its holding, the court said that "under Rowley, these failures to meet the [EHA's] procedural requirements are adequate grounds by themselves for holding that the school failed to provide" the child with a free appropriate public education. 774 F.2d at 635. The Fifth Circuit in Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986), concurred, saying:

> We agree with the Fourth Circuit in finding that failures to meet the Act's procedural requirements are 'adequate grounds by themselves'for holding that the school failed to provide a free appropriate public education, as mandated by the Act.

resolve that issue here. This is not a case in which a parent was reimbursed

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[15] (Continued)

806 F.2d at 629 (quoting Hall). However, the school in Jackson had also failed to provide a substantively appropriate IEP. The Jackson court remanded for a determination of the appropriate award, which it said could either be monetary (though no private school tuition had been paid by the parent) or take the form of remedial educational services. It has not yet been held, however, that procedural violations in and of themselves will justify an award of tuition reimbursement where a parent unilaterally decides to place his child in private school during the pendency of the due process proceedings and where the IEP offered by the public school for the period at issue is ultimately determined to be appropriate. See Scituate School Comm. v. Robert B., 620 F.Supp. 1224, 1231-32 n. 2 (D.R.I. 1985), aff'd without opinion 795 F.2d 77 (1st Cir. 1986) ("While grave procedural errors ... may be sufficient to invalidate an IEP on its face, no court has yet had to address the issue").

for the out-of-pocket expense of alternative placement after rejecting an IEP that would have provided his child with a free appropriate public education during the period for which reimbursement was ordered. In this case, the IEP to which Muth initially objected was found by the due process hearing officer to be inadequate; the process, taking a course not contemplated by the federal model, bogged down for a substantial period of time; and the IFP ultimately found to be acceptable did not even come into existence until May of 1984. While we are mindful of the fact that Muth contributed to the delays in the case, we cannot say that the district court abused its discretion in concluding that alternative placement of Alexander was

reasonable[16] and that reimbursement of Muth for the out-of-pocket expense of this alternative placement for the

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[16]The district court explained this decision, in part, as follows:

> Under these circumstances, I conclude that the appropriate remedy is reimbursement for one full year of tuition at the Landmark School. If the process had not been delayed by the flaws in the state process, a final decision would have been rendered by the Secretary of Education no later than December 1983 rather than October 1984. Mr. Muth would then have known that his challenge had failed at least at the state level, and he could have reevaluated his decision to place Alexander at Landmark at his own expense.

Memorandum and Order of August 28, 1986, App. at 835.

school year 1983-84 was required by equitable considerations.[17]

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[17]The School District claims that the reimbursement award is improper against it because the due process scheme of the state, and not the conduct of the School District, violated Muth's rights. In support of this contention, the School District cites Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied 474 U.S. 817 (1985) (holding no attorneys fee award should be made against school district where plaintiff prevailed because state administrative process conflicted with federal law). In this case, however, the School District is in part responsible for the absence of an appropriate IEP for Alexander during the course of the 1983-84 school year, and thus must remain jointly and severally liable with the Secretary.

IV.

We next address the question, raised on appeal by the Secretary, of whether the 11th amendment to the Constitution bars reimbursement by the state of plaintiff's expenses.[18] This is also an issue of statutory construction requiring plenary review.

The 11th amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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[18] As the 11th amendment claim is "in the nature a of jurisdictional bar", it may be raised and considered on appeal. Edelman v. Jordan, 415 U.S. 651, 678 (1974): see also Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1036 (7th Cir. 1987).

U.S. Const. amend. XI. As the Secretary correctly points out, the 11th amendment has been consistently interpreted by the Supreme Court to preclude federal court suits against a state by the state's own citizens, see, e.g., Welch v. State Dep't of Highways and Public Transportation, ____ U.S. _____, 107 S.Ct. 2941 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Parden v. Terminal Ry. of Alabama State Docks Dep't, 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890), and to preclude suits for equitable relief as well as damages, Edelman v. Jordan, 415 U.S. 651, 667 (1974). For 11th amendment purposes, a suit against a state official in his or her official capacity, as here, is the

equivalent of a suit against the state, since the state is the real party in interest. Edelman, supra, 415 U.S. at 666-67. Accordingly, we are confronted with the issue of whether the 11th amendment bars suits against a state in a federal court under the EHA.

Section 5 of the 14th amendment authorizes Congress to enforce the provisions of that amendment by "appropriate legislation." Utilizing this authority, Congress may abrogate the immunity from federal court suits bestowed on the states by the 11th amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). However, if Congress chooses to override 11th amendment rights, it must make its intentions clear. The Supreme Court has admonished that federal courts must "be certain of Congress' intent before finding that federal law overrides the

guarantees of the Eleventh Amendment." Scanlon, supra, 473 U.S. at 243. So that immunity will prevail in the absence of a conscious congressional decision that it must be sacrified (sic) to preserve 14th amendment values, the Supreme Court has declared that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Id. While the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress's intention to lift the bar has been made sufficiently manifest. United States v. Union Gas Co., 832 F.2d 1343, 1349-50 (3d Cir. 1987).

The text of EHA and its legislative history leave no doubt that Congress

intended to abrogate the 11th amendment immunity of the states. In the preamble of the Act, Congress declared it necessary to exercise its rights under §5 of the 14th amendment in order to assure equal protection of the law for handicapped children. Thus in §1400(b)(9), Congress expressly "finds that ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."

The EHA then goes on to establish a national minimum standard for the education of handicapped children and to set up a detailed process for identifying handicapped children and ascertaining what the federal standard requires in each individual case. The

state educational agency is responsible under the EHA to see that this process is successfully implemented. Moreover, if for any reason a local educational agency is unwilling or unable to provide a handicapped child with a "free appropriate public education," the state agency is required to step in and provide that education by contract or otherwise. §§1411(c)(4), 1413(b), 1414(d); 34 C.F.R. §300.360. Most importantly, the EHA not only confers substantive and procedural rights upon handicapped children and their parents vis-a-vis the state educational agency, it bestows upon them the right to seek judicial enforcement of those rights in a federal or state court. Section 1415(e)(2) provides that

> any party aggrieved by the findings and decision (made in the administrative process)

> shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Because the EHA and its legislative history reflect the "most basic of political knowledge that free public education is provided by and under the aegis of the states," the Court of Appeals for the First Circuit concluded in David D. v. Dartmouth School Comm., 775 F.2d 411, 422, (1st Cir. 1985), that Congress clearly contemplated litigation under the Act against a state in the federal courts. We find its reasoning compelling:

> Under the federal Act and its implementing regulations, the State educational agency promises to ensure that it and its local educational agencies will provide at minimum a free appropriate public education. Part of

these guaranteed rights is the due process complaint and hearing system which is to take cognizance of "any matter relating to" a disabled child's education or procedural rights. The culmination of the state administrative appeals process is the right of any party "aggrieved" by the decision or procedure employed to take the matter to either state or federal court. §1415(e)(2). Obviously, since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding. The legislative history reinforces this view. See supra at 13 (primary author of bill stated: "In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child...").

Id.

After the decision in David D., Congress amended §1415(e) to provide for counsel fee awards under specified circumstances. In that 1986 amendment, Congress expressly noted its understanding that suits in the federal or state courts under §1415(e) necessarily involve "the State or local educational agency" as a party. 20 U.S.C. §1415(e)(4)(G).

Although a number of other courts of appeal have held that the EHA does not abrogate 11th amendment immunity, none have articulated a rationale as persuasive as that of the First Circuit and none have reached this result after the 1986 Amendment to the EHA. See Gary A. v. New Trier High School Dist., 796 F.2d 940, 943-44 (7th Cir. 1986); Miener v. Missouri, 673 F.2d 969, 980-82 (8th Cir. 1982), cert. denied 459 U.S. 909

(1983); Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir. 1984), cert. denied sub nom. Lutjeharms v. Rose, 474 U.S. 817 (1985); Doe by Gonzales v. Maher, 793 F.2d 1470, 1493-94 (9th Cir. 1986), later proceeding 795 F.2d 1470, 1493-94 (9th Cir. 1986), later proceeding 795 F2d (sic) 787, cert. granted in part sub nom. Honig v. Doe, 55 U.S.L.W. 3569 (1987) (not on 11th amendment issue).

We now join the Court of Appeals for the First Circuit in holding that the EHA authorizes suits against states in a federal court. Since the "jurisdictional bar (of the 11th Amendment) applies regardless of the nature of the relief sought," Pennhurst, supra, 465 U.S. at 100, and there is thus no distinction to be made between actions for injunctive relief and for damages in the context of an EHA suit

against a state agency, we hold that Congress, in authorizing such suits, must have contemplated that tuition reimbursement judgments like the one here entered against Pennsylvania would be a party of §1415(e) litigation.

V.

The final question before us concerns the aware of attorneys' fees to Muth, which we review for abuse of discretion. Lindy Bros. Builders, Inc. v. American Radiator & Sanitary Corp., 487 F.2d 161, 166 (3d Cir. 1973). The award originally made included only fees incurred in connection with the due process issue, on which plaintiff prevailed by summary judgment. This award was modified shortly thereafter to include fees incurred in litigating the

merits of the issue of the appropriateness of the 1983-84 IEP. In its final decision on the issue, the district court recognized that the procedural challenge on which Muth prevailed was entirely distinct, factually and legally, from Muth's substantive claims on the merits of the 1983-84 IEP and the 1986-87 proposed IEP. Because the court had deferred its decision on reimbursement, however, it found that Muth was entitled to recover some of the costs he incurred in litigating the merits, explaining:

> at the time the plaintiff moved for summary judgment, defendants opposed the award of tuition reimbursement, and it was not clear to me that reimbursement would be appropriate. I therefore deferred my decision on a remedy for the procedural

> violation until I was able to determine the appropriateness of the proposed I.E.P.'s. Thus, the plaintiff was required to litigate th merits of the proposed 1983-84 I.E.P. in order to win tuition reimbursement for that school year. Because the court in June considered the issues to be interrelated, the plaintiff was forced to incur additional attorney's fees. it (sic) would be unfair to penalize the plaintiff by applying hindsight to determine that the two issues had no common nexus of fact or law.

Memorandum and order of February 20, 1987, App. at 884.

An award of attorneys' fees in an EHA action is allowable under the Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, §2 codified at 20 U.S.C. §1415(e)(4)(B), when the

plaintiff is the prevailing party.[19] The governing standard for determining awards to partially prevailing plaintiffs is set by Hensley v. Eckerhart, 461 U.S. 424, 433, 440 (1983), which provides that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."

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[19] 20 U.S.C. S1415(e)(4)(B) reads:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys fees as part of the costs to the parent or guardian of a handicapped child or youth who is the prevailing party.

We find the trial court's final decision unacceptable given the teachings of Hensley. Muth prevailed only on his procedural claims, and any award for attorneys' fees beyond those incurred in addressing that issue is an abuse of discretion. Accordingly, we remand for an allocation of attorneys's fees in accordance with the principles of Hensley.

VI.

For the reasons set forth above, we will affirm the judgment of the district court on every issue save that of the award of attorneys' fees, on which we will remand for a determination consistent with this opinion. Each Party to bear its own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.		
MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al.	:	No. 84-2032

MEMORANDUM OPINION AND ORDER

HUYETT, J. JUNE 2, 1986

Presently pending before me in this action, based on the Education For All Handicapped Children Act (EAHCA), 20 U.S.C. §1401, is plaintiff's motion for summary judgment. By order dated November 18, 1985, I granted plaintiff leave to file a second amended complaint to raise certain issues which prior

counsel had omitted including the issue of whether Pennsylvania's administrative procedure used to determine the appropriate education for a handicapped minor, complies with the dictates of the federal EAHCA. Plaintiff has now moved for summary judgment on this issue. For the reasons which follow, I shall grant plaintiff's motion.

Section 615 of the EAHCA, 20 U.S.C. §1415, states in pertinent part that a parent of a handicapped child shall have an opportunity for an impartial due process hearing to challenge the educational program devised by the school district. This impartial due process hearing shall be conducted by the state educational agency, or by the local or intermediate educational agency as determined by state law. §1415(b)(2). If the hearing is conducted by the local educational

agency or an intermediate education agency, any party may appeal the findings and decision rendered in the hearing to the state educational agency. §1415(c). On appeal, the state educational agency shall conduct an impartial review of such hearing, and the officer conducting the review shall make an independent decision upon completion of such review. Id.

The regulations implementing §1415 track the statute's language and provide certain elaborations. For instance, the initial hearing must be impartial and therefore cannot be conducted "by a person who is an employee of a public agency which is involved in the education or care of the child." 34 C.R.F. §300.507. If the state establishes a two-tier system, i.e., if the hearing is conducted by a public agency other than the state educational

agency, the state educational agency may conduct an impartial review which shall include examining the entire administrative record, ensuring that the procedures at the hearing were consistent with the requirements of due process, and if appropriate, taking additional evidence.

Plaintiff in his motion for summary judgment contends that the Pennsylvania Administrative Procedure as set forth in the Pennsylvania Code and as applied in this case violates the due process requirements set forth in the EAHCA. Before examining plaintiff's contentions, however, it is necessary first to determine what the Pennsylvania Administrative Procedure is and how it was applied in this case.

The Pennsylvania Administrative Procedure is set forth in 22 Pa. Code §13.31 et seq. Section 13.32(2)

provides that a parent is to be notified of "the right to a full hearing before the Secretary or the designee of the Secretary." If a parent decides to request a due process hearing because there is no agreement as to the assignment of a child, the school entity must forward the request for a hearing to the Department of Education within ten days of the receipt of the request. §13.32(10). The hearing is then held in the school district and at a place convenient to the parent. §13.32(11). The hearing officer is assigned by the Secretary. §13.32(12). The decision of the hearing officer may be appealed to the Secretary of Education. §13.32(24).

In this case, plaintiff and the Central Bucks School District personnel were unable to agree on a proposal for the appropriate placement of plaintiff's

minor son, Alexander. On June 17, 1983, plaintiff requested a due process hearing to address the School District's failure to provide an "appropriate" education for Alexander. On September 30, 1983, a due process hearing was held before Hearing Officer Bernard Trent. On October 31, 1983, Mr. Trent issued his decision in which he concluded that Alexander was an extremely intelligent but severely learning disabled child who had not received an appropriate education; he further held that when developing a program for Alexander, the School District had to consider the potential to function within the gifted range and provide him with special activities and services not ordinarily provided in a regular program.

Both the School District and plaintiff appealed the Hearing Officer's decision to the Secretary of Education pursuant to 22 Pa.Code §13.32(24). The Secretary of Education remanded the case on January 23, 1984 to the Hearing Officer with instructions to the District to present additional information in the form of a revised Individualized Educational Program (I.E.P.) reflecting certain recommendations which had been made on June 17, 1983. Mr. Trent issued his final decision on July 25, 1984 in which he stated that modifications and adjustments which the Central Bucks School District made to the March 28, 1984 I.E.P. constituted an appropriate program for special education for Alexander. On appeal, the Secretary adopted the Hearing Officer's conclusions and dismissed plaintiff's

exceptions. This action arises from plaintiff's appeal of the Secretary's final decision.

Plaintiff argues first that the Pennsylvania process violates the "finality" requirement of the EAHCA. The basis for plaintiff's position is his contention that the due process hearing, which in this case was conducted by Mr. Trent, is a state level hearing. In support of this contention, plaintiff points to 22 Pa.Code §13.32(2) which states that due process hearings are to be conducted "by the Secretary or the designee of the Secretary." Under the Pennsylvania system, the state agency is also responsible for reviewing the hearing officer's findings and decision. However, pursuant to the EAHCA, §1415(c), an appeal may only be taken to the state agency if the hearing is conducted initially at the local or

intermediate agency level. Plaintiff argues, therefore, that because the hearing officer's decision in Pennsylvania is a state level decision, it should be final subject only to the review of the judicial system.

Plaintiff draws a parallel between the Pennsylvania process and several in other states which have been struck down as contravening federal law. In several of the cases, the findings and decisions of the hearing officers were characterized as special master reports to the Secretary of Education and therefore violated the finality rule. For instance, in Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), the court struck down use of a master's report at the state level when the state board of education could accept or reject the findings; this procedure failed to comply with the requirement that the

decision be final unless appealed to state or federal court. Plaintiff argues that the Pennsylvania process is similar to that aspect of the Georgia system which was struck down in Helms in that the initial hearing is a state level hearing which is then reviewed by the Secretary. The written procedures given to parents who wish to object to the report of the hearing officer support plaintiff's contentions. They specifically state: "A hearing officer's report constitutes Findings of Fact made by the hearing officer and a list of recommended orders (recommendations) which the hearing officer believes the Secretary of Education should adopt." See Attachment to plaintiff's motion for summary judgment. This provision certainly suggests that the hearing officer is an agent of the Secretary of Education

whose conclusions may be accepted or rejected.

Defendant Smith, in response to plaintiff's motion for summary judgment, argues that plaintiff's position with respect to the finality issue is based on two false assumptions: one, that the initial hearing is a state level hearing and two, that the hearing examiner's report is the report of a special master whose findings are not final. Defendant Smith contends that the Secretary is required by federal regulation to maintain a list of persons who shall serve as hearing officer. In support of this contention, defendant Smith points to 45 C.F.R. §121a.507 (1979). This section of the Code of Federal Regulations has been repealed and replaced by 34 C.F.R. §300.507(c); however, the wording has not been

changed. Nevertheless, this provision does not appear to support the Secretary's position. Section 300.507(c) states:

> Each public agency shall keep a list of the persons who serve as hearing officers. This list must include a statement of the qualifications of each such person.

This section does not require the Secretary of Education to keep such a list, and nothing in the provision suggests that the public agency referred to is necessarily the state educational agency. Rather, "public agency" as used in the regulations seems to refer to whatever agency conducts the hearing under the state system; this may be the state educational agency, the intermediate educational agency or the local agency.

Both defendants also contend that the due process hearing is actually conducted by the local educational agency because it is scheduled by the local agency, it is held in the local school district, and the school district has the burden of going forward at the hearing. Although this issue is close, I do not find these factors to be conclusive. The Pennsylvania Code specifically states that the parent has the right to a hearing before the Secretary or the designees of the Secretary. I am not sure what other meaning can be given to this provision other than that the initial hearing is conducted at the state level.

Even if I were to conclude that the original hearing is conducted by the local educational agency, I believe plaintiff would be entitled to summary

judgment because of the procedural flaws in the appeal process, particularly as it was applied in this case. As previously outlined, under the EAHCA, an appeal may be taken from a local level hearing to the state educational agency; the state agency "shall conduct an impartial review of such hearing." Moreover, "the officer conducting such review shall make an independent decision upon completion." 20 U.S.C. §1415(c). The corresponding regulations also provide that the state educational agency shall conduct an impartial review. 34 C.F.R. §300.510(b). Plaintiff contends that the state level review, like the initial due process hearing, must be conducted by impartial officers who are not employees of a public agency involved in the education or care of the child. Plaintiff

contends that this rule precludes the Secretary of Education from participating in the review process.

In Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), the court held that the term "impartial review" in §1415(c) means that review cannot be conducted by an employee of the Department of Public Instruction. In Grymes, the court was reviewing the Delaware administrative process under which the initial hearing was conducted by an impartial hearing officer appointed by the local educational agency. The hearing officer's ruling could be appealed to the State Board of Education; the state level review was conducted by an employee of the Department of Public Instruction. The court held that the legislative history supported the lower

court's determination that use of State Board employees as review officers contravened federal law.

The Senate Conference Report on §1415 specifically states:

> No hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing.

Senate Conference Report, 1975 U.S. Code Cong. & Ad. News, 94th Congress, First Session, pp. 1425, 1502. This language suggests that Congress was concerned that both the initial due process hearing and any subsequent review be conducted by an impartial individual.

In response, defendants contend that the Secretary of Education should not be classified as an employee of the Board because she is a high public official whose gubernatorial appointment distinguishes her from "employees" of the Board. The Secretary of Education is appointed by the Governor of the Commonwealth in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania. 71 P.S. §67.1(d)(1). The issue, therefore, is whether an individual holding a position provided for in the Pennsylvania Constitution is an employee of the public agency which he or she heads for purposes of 34 C.F.R. §300.507. Defendants rely on Brandon F. v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740, 746 (E.D. Wis. 1984) in which the court held that the Superintendent of Public Instruction

was a constitutional officer in the State of Wisconsin and not a school employee and therefore that the Superintendent was qualified to conduct an appeal of the due process hearing under 20 U.S.C. §1415. Similarily, the court in Victoria L. by Carol A. v. District School Bd., 741 F.2d 369, 374 (11th Cir. 1984), dismissed the argument that the Florida Commissioner of Education could not conduct a review of the hearing findings as frivolous.

A careful examination of the purpose behind the regulation that employees of the public agency involved in the education or care of the child may not conduct the state level review suggests that the court's decisions in Brandon E. and Victoria L. may have been misguided. Congress was concerned that handicapped minors and their parents be

assured impartial review. To this end, they want to ensure that the individuals conducting the reviews be as free from political and fiscal pressures as possible. In the Senate Conference Report, it was specifically pointed out that: "any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer..." Senate Conference Report, 1975 U.S. Code Cong. & Ad. News, 94th Congress, First Session, pp. 1425, 1502. Congress made it clear that it intended this language to apply to both local level hearings and state level reviews.

Although the Secretary of Education may not technically be an employee of the Department of Education, I nevertheless conclude that she must be considered an employee of Pennsylvania's

state educational agency for purposes of 34 C.F.R. §§300.510 and 300.507(a). She directly exercises both fiscal and regulatory control over the school district and as plaintiff notes, is at least as involved in the education of handicapped children as were the employees of the Delaware Department of Public Instruction in Grymes. See also Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980); Vogel v. School Board of Montrose R-14 School District, 491 F.Supp. 989, 994-95 (W.D. Mo. 1980).

An additional procedural irregularity occurred in this case which plaintiff has not raised but which I believe is important considering the flaws identified in the Pennsylvania administrative process. After the initial due process hearing before

Mr. Trent, both plaintiff and the School filed an appeal to the state level. On appeal, the Secretary of Education did not issue a final order; he remanded the case on January 23, 1984 to the Hearing Officer with an instruction to take additional evidence to address recommendations that had been made to review the I.E.P. On remand, after hearing the additional evidence, Mr. Trent issued a decision in favor of defendant school district. Plaintiff again filed an appeal, and the Secretary affirmed the Hearing Officer's decision.

Nothing in the EAHCA or the accompanying regulations provides for the remanding of a case from the state level to the local level for the taking of additional evidence. Rather, 34 C.F.R. §300.510(b) specifically

states that the "state educational agency shall conduct an impartial review of the hearing." Subsection (3) suggests that the official conducting the state level review may want to seek additional evidence but nothing in the provision suggests that the case should be remanded for additional hearing; any additional hearings are to be conducted at the state level with the same rights accorded to parents as in the initial due process hearings. Comment 1 to 34 C.F.R. §300.510 provides that although the state agency may rely on another state agency to conduct the review, it remains responsible for the final decision on review. This reiterates the conclusion that the state agency may not simply remand the case to the local level for additional hearings. In fact, the Secretary's

action in remanding the plaintiff's case to Mr. Trent supports plaintiff's theory that the hearing officer is nothing more than a special master whose report and findings the Secretary may accept or reject.

Defendants contend that plaintiff's challenge to the Pennsylvania administrative process as applied in this case must fail because he failed to raise these issues during the administrative process. However, because it would probably have been futile or plaintiff to raise these claims about the manner in which the Pennsylvania process contravened federal law when he was attempting to use that process for his son's benefit, I do not believe it is appropriate to bar plaintiff from raising these claims now.

Having concluded that the Pennsylvania administrative process, particularly as it was applied in plaintiff's case, contravenes federal law, the issue becomes what is the next appropriate step in this action. Plaintiff contends that given the procedural flaws I should order the payment of tuition reimbursement for the years in which his son has been at the private Landmark School and should order defendants to continue such payments in the future, i.e. to order that Alexander's appropriate placement is the Landmark School. In support of this position, plaintiff contends that the first decision of Hearing Officer Trent, the decision favoring plaintiff, should be given great weight; plaintiff also contends that defendants have never appealed from this first decision.

However, it is my understanding that the first appeal to the Secretary was a cross appeal filed by both plaintiff and the School District.

As the court noted in Grymes v. The State Board of Education, No. 79-55, slip op. at 7-8 (D.Del. January 7, 1971), procedural errors in an administrative proceeding may often require the remanding of the action to the agency to take corrective action. However, the EAHCA provides for a form of judicial review which makes remand unnecessary. Pursuant to Section 1415(e)(2), the court may make an independent decision based on the administrative record and any additional evidence submitted by a party and based on the preponderance of the evidence. Moreover, in this action, I am very concerned by the excessive delays which have occurred which may have operated to

plaintiff's detriment. I do not believe it is appropriate for me to order tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff's son with an appropriate free education.

In order to put this case in the same position it would have been in if the procedural flaws had not occurred, I will treat the hearing as an appeal from Officer Trent's first decision by the School District. The School District will therefore have the burden of going forward and establishing that the I.E.P. they proposed would be appropriate. The failure of the state and the School District to comply with the procedural requirements of the EAHCA including the excessive delays will certainly be a

factor for me to consider when determining what relief, if any, is appropriate.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

ORDER

NOW, June 2, 1986, upon consideration of plaintiff's motion for summary judgment, defendant's responses, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED IN PART. Judgment is entered in favor of plaintiff and against defendants as to plaintiff's claim that the Pennsylvania

administrative procedure contravenes federal law. IT IS FURTHER ORDERED that a conference shall be held in the case on June 24, 1986 at 1:30 p.m., in chambers (Room 12614), U.S. Courthouse, Phila., PA.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER

HUYETT, J. AUGUST 28, 1986

Plaintiff Russell A. Muth, individually and on behalf of his minor child, Robert Alexander Muth, brought this action seeking declaratory and injunctive relief against the Secretary of Education for the Commonwealth of Pennsylvania, Margaret A. Smith, the Central Bucks School District and Dr. Thomas L. Newman, Superintendent of the Central Bucks School District. The

following constitutes my findings of fact.

1. I incorporate by reference the uncontested stipulation of facts entered into by all of the parties.

2. Robert Alexander Muth ("Alexander") is a minor who has been diagnosed as having specific learning disabilities and experiences auditory perceptual dysfunction and secondary emotionality. In addition to a neurologic impairment and a language learning disability (dyslexia), Alexander also suffers from a low self-esteem and related emotional problems. His disability manifests itself in receptive and expressive language weaknesses.

3. Margaret A. Smith is the Secretary of Education of the Commonwealth of Pennsylvania, and as

such, is the head of the state educational agency ("SEA"), as defined in 20 U.S.C. §1401(7).

4. Defendant Thomas L. Newman is the Superintendent of the Central Bucks School District, the "local educational agency" ("LEA"), as defined in 20 U.S.C. §1401(8).

5. Defendant Central Bucks School District ("District") is the LEA which is charged by the Education For All Handicapped Children Act, 20 U.S.C. §1401 with providing Alexander Muth a free appropriate public education.

6. Alexander was enrolled for the first time in the Central Bucks School District in September 1980. His previous education had been in Spanish as he had been living with his mother in Columbia, South America.

7. When he arrived in Philadelphia, Alexander was tested by Dr. Thomas

Atkins, a clinical psychologist at Children's Hospital. As of the date of that testing, July 1980, the following Wide Range Achievement Test scores were obtained: reading -- 2.0 grade equivalent; spelling -- 1.9 grade equivalent; and mathematic computation -- 3.5 grade equivalent.

8. During the 1980-1981 school year, Alexander was placed in the learning disabilities resource room.

9. Alexander was mainstreamed for art, physical education, lunch and recess with 5th grade students and was mainstreamed in music and library with 4th grade students.

10. Alexander's father approved the individualized education program plan ("I.E.P.") for the 1980-81 year.

11. The I.E.P. was revised in February 1981 with the approval of

Alexander's father. Under the revised I.E.P., Alexander remained in the learning disabilities resource room. In addition, he received speech therapy, adaptive physical education, and English as a second language tutoring.

12. Alexander was tested again in March, 1981 by Elizabeth Fallon, a certified school psychologist. Alexander's scores on the Wide Range Achievement Test had improved as follows. Reading from grade 2.0 level to grade 3.2 level; spelling from grade 1.9 equivalent to a 2.4 grade equivalent; and mathematic computation from grade 3.5 equivalent to a 4.1 grade equivalent.

13. For the 1981-1982 school year, Alexander was again placed in the learning disabilities resource

classroom. He also received speech therapy as a special service.

14. In February, 1982, Fallon administered a Wechsler Intelligence Scale for Children -- Revised and noted a verbal I.Q. of 98, a performance I.Q. of 139, and a full-scale I.Q. of 120.

15. In February 1982, Fallon also again administered the Wide Range Achievement Test. At this time, Alexander obtained scores of 3.8 grade equivalent in reading; 2.4 grade equivalent in spelling and 4.1 grade equivalent in mathematic computation.

16. Fallon noted that Alexander had diminished self-esteem, and she recommended counseling for Alexander. Due Process Hearing, September 30, 1983, Tr. 72-75.

17. Alexander enrolled in the Lenape Junior High School in the Central Bucks District in September 1982. He was

again placed in a learning disabilities resource room. He was mainstreamed in physical education, art, music, and library.

18. Between the spring of 1982 and June 1983, Ms. Fallon counseled Alexander on approximately 40 occasions. These sessions were either with Alexander individually or with both Alexander and his father, and several took place over the telephone. Due Process Hearing, September 30, 1983, Tr. 72-75.

19. Vincent Talerico testified at trial in a straight-forward and sincere manner. I found his testimony to be credible.

20. Talerico first became involved with Alexander in November 1982 in the resource room. Alexander was experiencing some problems because he

felt stigmatized by his placement in the learning disabilities classroom.

21. During the 1982-1983 school year, Alexander was absent 33 days. Due Process Hearing, September 30, 1983. Tr. 16.

22. During the school year, Alexander expressed a desire to be mainstreamed. He expressed the belief that he could do well in a normal program to Ms. Fallon.

23. In March 1983, the Wide Range Achievement Tests were again administered. Alexander's scores showed an improvement in all three subjects tested. His reading score improved from a 3.8 grade equivalent in 1982 to a 4.9 grade equivalent; his spelling rose from 2.5 to 3.9, and his mathematic computation rose from 4.1 to 6.4.

24. In March 1983, with the request of Alexander's father, the multi-disciplinary team agreed to mainstream Alexander in science and English as of March 11, 1983 on a diagnostic basis only.

25. Alexander continued to receive specialized speech services and resource room instruction in reading and mathematics. Throughout the mainstreaming trial, Alexander was closely monitored by Ms. Fallon, Vincent Talerico, his special education teacher, and his guidance counselor.

26. An aide accompanied Alexander to his English and science classrooms and worked with him on his assignments in extra periods. Due Process Hearing, September 30, 1983, Tr. 111.

27. Mr. Talerico testified that although Alexander was initially very motivated in the mainstream class, after the first two weeks, he became increasingly frustrated and fell behind in his work. His frequent absences are believed to have contributed to his problems in the mainstream program.

28. To improve Alexander's self-esteem, Ms. Fallon and Mr. Talerico attempted to get Alexander involved in extra curricular activities such as Boy Scouts, Little League, and track, but Alexander's father was reluctant to give his permission for such activities. Due Process Hearing, September 30, 1983, Tr. 81-82.

29. On June 17, 1983, the multidisciplinary team again met with Mr. Muth and advised him that it was the team's conclusion that mainstreaming had

been unsuccessful and that for the 1983-1984 school year, it was their recommendation that Alexander be returned to the learning disabilities resource room for English and science as well as his other substantive subjects. At the June 17, 1983 meeting, no I.E.P. was formed for the 1983-1984 school year; it was decided that the I.E.P. would be formed in September at the beginning of the academic year.

30. Immediately after the conference on June 17, 1988, Mr. Muth requested a due process hearing. By letter dated August 15, 1983 to Dr. Laws of the Central Bucks School District, Mr. Muth specifically requested the School District to make no further changes in the I.E.P. for his son. As he noted, any changes would constitute a violation of Pennsylvania law.

31. Alexander attended Lenape for two days at the beginning of the 1983-1984 school year. He was then withdrawn from Lenape and placed at the Landmark School in Prides Crossing, Massachusetts. He has not attended school in the Central Bucks District, therefore, since the 1982-1983 school year.

32. A due process hearing was held on September 30, 1983 before Hearing Officer Vernard Trent. A transcript of this hearing was admitted into evidence at trial. Trent commenced the hearing by stating that he was serving as a designee for the Secretary of Education and the hearing was to determine if the I.U. (Intermediate Unit) had offered or afforded Alexander an appropriate educational program.

33. Mr. Muth attended the due process hearing and acted as his own counsel.

34. On October 31, 1983, Trent rendered his decision. He did not order Alexander's placement in a particular program, but he did require the District to provide "special activities or services not ordinarily provided in the regular program." Trent found that although th I.E.P. addressed Alexander's perceptual dysfunction, this information was not translated into instructional strategies and classroom activities. He also concluded that Alexander needed help coping with his socio-emotional difficulties which could be provided through intensive counselling, crisis intervention and an effective program of behavior. Trent also recommended that consideration be given to Alexander's

potential to perform within the gifted range. See CB Ex. 15.

35. Both the School District and Mr. Muth appealed Trent's decision.

36. On January 23, 1984, the Secretary of Education remanded the case to the Hearing Officer and ordered Central Bucks to present additional evidence in the form of a revised I.E.P. to reflect the modifications proposed at the June 17, 1983 conference by the multidisciplinary team.

37. On March 28, 1984, an I.E.P. conference was held. Mr. Muth was unable to attend so only the multidisciplinary team was present.

38. Mr. Muth refused to authorize the release of Landmark records to Central Bucks.

39. Another I.E.P. conference was held at Mr. Muth's request on April 27, 1984 at 6:00 a.m. Some revisions to the

I.E.P. proposed by the multidisciplinary team were made.

40. A revised I.E.P. was issued on May 1, 1984. C.B. Ex. 12. A Notice of Recommended Assignment ("NORA") was sent to Muth on May 1. Plaintiff Muth did not accept this I.E.P., and requested another due process hearing.

41. The hearing before Trent was reconvened on June 7, 1984.

42. On July 25, 1974, Trent issued his decision approving the revised I.E.P.

43. Mr. Muth appealed Trent's decision.

44. On October 24, 1984, Margaret A. Smith, Acting Secretary of Education, adopted Trent's decision.

45. Under the revised I.E.P. for 1983-1984, Mr. Talerico would have been Alexander's learning disabilities teacher. Because, Alexander's strengths

were in the visual area, Mr. Talerico proposed to use a teaching methodology referred to as visual, auditory, and kinesthestic tactile modes or VAKT.

46. Mr. Talerico also intended to emphasize Alexander's creative development by using problem solving and brainstorming techniques.

47. Alexander would have been placed in classes which would have had at most 12 students but usually no more than 5 to 7. In addition to the learning disabilities teacher, each class would also have had an aide to assist the students on a one-to-one basis.

48. Mr. Talerico also testified that Alexander would have received approximately 60 minutes per day of one-to-one attention in the classroom.

49. Psychological counseling was available at Central Bucks School District to address not only problems

Alexander may have been having in school but also problems at home.

50. For each subject matter, the revised I.E.P. set criteria for successful performance. For instance, in reading, for structual analysis skills, the goal was 80% accuracy while for decoding skills the goal was 90% accuracy. Achievement of these goals was to be monitored by teacher observation in class, grading of daily assignments and unit tests.

51. In September 1983, Alexander was enrolled in the Beverly Farms program of the Landmark School. This program is designed for children with language disabilities, and it offers an intensive language based program. All of the children enrolled in the program have a discrepancy between their verbal and performance IQs.

52. The Landmark School developed an I.E.P. for the 1983-1984 school year; a copy of this I.E.P. was admitted at trial as C.B. Ex. 5.

53. The Landmark School I.E.P. for 1983-1984 emphasized the use of the VAKT program which is the same methodology Mr. Talerico proposed to use at the Lenape School.

54. Karl Pulkinnen, program director for the North Campus of the Landmark School testified at trial. I found him to be a qualified witness who testified in a candid and sincere manner.

55. The Landmark School I.E.P. also emphasized the use of one-to-one tutorials. Mr. Pulkinnen testified that Alexander spent approximately 45 minutes per day in a one-to-one tutorial. On cross-examination, however, Pulkinnen stated that the tutor might or might not be a certified special education teacher

or even a certified teacher. The tutors, however, do receive intensive training for ten days each summer with three-day review sessions during the school year.

56. The goals and objectives set forth in the I.E.P. prepared by the Landmark are very similar to the goals and objectives set forth in the revised I.E.P. prepared by Central Bucks.

57. After the normal school day at Landmark, there is a supervised homework-make-up period which a child must attend if he or she has not completed the day's assignments. In the evenings, there is a supervised study hall which is monitored by the same staff which is involved in the teaching.

58. Landmark offers pre-vocational programs to reinforce motor skills.

59. Mr. Pulkinnen agreed that goals set forth in the Central Bucks I.E.P. were appropriate but he believes that the method for implementing them would not be as effective as the language based approach used at the Landmark School.

60. Dr. William Adamson, a psychiatrist at the University of Pennsylvania Medical School testified at trial. I found him to be well-qualified. He testified in a candid and forthright manner, and I found him to be a credible witness.

61. Dr. Adamson first evaluated Alexander in the spring of 1983 and determined that Alexander had several problems including a neurological impairment, a severe learning disability and low self-esteem which Dr. Adamson referred to as a narcissistic wound.

62. Dr. Adamson recommended the Landmark School to Mr. Muth because it has an intensive language-based program.

63. Dr. Adamson has continued to see Alexander since the spring of 1983. He noted a change in Alexander after his first few months at the Landmark School, particularly in his emotional state; Alexander was initially "happy" at Landmark.

64. Dr. Adamson, on cross-examination, described the relationship between Alexander and his father, Russell Muth, as that of "two ships passing in the night." Alexander evidently at times feels a sense of rejection arising from the separation of his parents and the communication problems with his father.

65. On March 28, 1985, Alexander was removed from the Landmark School. His school records do not reveal the reason for Alexander's withdrawal, but Dr. Adamson testified that Alexander had told him that he left because things had been stormy at Landmark in the fall of 1984. Alexander had met a girl who, shortly after Christmas holiday, broke up with Alexander. This was another blow to his self-esteem and caused him to "hate" Landmark.

66. Alexander was enrolled at the Wyncote Academy on April 15, 1985 in a regular education program.

67. Wyncote Academy provides no special education or support services for children with learning disabilities.

68. Dr. Adamson visited Wyncote and met with Alexander's teachers to discuss how to assist Alexander in class, but

this was the limit to the special provisions made for Alexander at Wyncote.

69. Alexander remained at Wyncote for the 1985-1986 school year. Alexander maintained a passing average at Wyncote.

70. At my request, Central Bucks prepared a proposed I.E.P. for the 1986-1987 academic year.

71. The assignment proposed by Central Bucks for the 1986-1987 school year would be the Central Bucks East High School.

72. Under the proposed I.E.P., Alexander would spend one-half of his day in a learning disabilities classroom for his major subjects and one-half a day either in a vocation-technical program at the area vo-tech school or in electives.

73. Bruce Taylor, Supervisor of Special Education, testified at trial in a candid and professional manner, and I found him to be a credible witness.

74. Mr. Taylor was involved in the preparation of the proposed 1986-1987 I.E.P. for Alexander. The I.E.P. is based on Alexander's records from Landmark and Wyncote and an evaluation of Alexander performed by Dr. Atkins. See C.B. Ex. 8.

75. Dr. Atkins concluded in his report that Alexander does not have much interest in academic work, but that he has "very exceptional nonverbal abilities and interests that might be better addressed and capitalized on in alternative vocational or technical school setting."

76. Alexander would be placed in the 11th grade. There would be approximately 23 learning disabled

students in the 11th grade program spread over three classrooms. Each class would have one certified special education teacher and one teacher's aide.

77. Alexander would be evaluated for participation in the gifted program. Under this program, a student may be assigned to a volunteer professional who will serve as the student's mentor in the particular area of expertise, e.g. art.

78. Alexander will be assigned a guidance counselor. In addition, social counseling and school psychologists will be available.

79. In developing the I.E.P. for 1986-1987, Central Bucks has borrowed the objectives set by the Landmark School in the last I.E.P. it prepared for Alexander. Emphasis will be placed on the VAKT approach previously proposed

by Mr. Talerico to tackle Alexander's language based problems, particularly with decoding.

80. Use will also be made of computer software packages which are designed specifically for learning disabled children.

81. Alexander's progress will be evaluated by day-to-day teacher observation, periodic tests as well as a pre and post testing program.

82. The program proposed for Alexander is highly structured and will provide for individual instruction.

83. As well as focusing on specific subject matter, the program prepared for Alexander will also focus on developing study skills.

84. Tutoring is not provided by the school district, but individual,

one-to-one instruction will be available in the classroom.

85. If Alexander elects to attend the vo-tech school, support services will be provided because the vo-tech program is part of the regular education program.

86. It is unlikely that Alexander would be able to participate in the technical courses offered at the vo-tech school because he will not be able to take the prepatory math course which is a prerequisite.

87. If Alexander does not elect the vo-tech program, he would have a number of electives to chose (sic) from for which he would be mainstreamed.

88. Dr. Robert Laws testified at trial. He too was candid and testified in a sincere and forthright manner.

89. Dr. Laws is a certified school psychologist who has a Ph.D. in educational administration.

90. Dr. Laws testified that in his opinion the I.E.P. proposed for 1986-1987 was appropriate because it is geared towards maximizing Alexander's strengths and it is a less restrictive placement. Dr. Laws emphasized the need for Alexander to have contact with regular education students.

91. Dr. Laws noted that Alexander's progress at the Landmark School followed the pattern of his progress at the Central Buck's (sic) schools. In both cases, he made initial strides, but then showed problems in adjusting to the program. Alexander shows a problem with accepting constructive criticism and has a low level of self-motivation.

92. Dr. Laws also emphasized the emotional problems Alexander has and the need for him to build a relationship with his father which would not be possible if he were placed in a residential program in Massachusetts.

DISCUSSION

Plaintiff filed this action on April 27, 1984 pursuant to the Education for All Handicapped Children Act ("EAHCA" or the "Act"), 20 U.S.C. §1415(e)(2).[1] Plaintiff presently seeks a declaration that the 1983-84 Individualized

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[1]Plaintiff's initial complaint also contained claims pursuant to §504 of the Rehabilitation Act, 29 U.S.C. §794 and the equal protection and due process clauses of the fourteenth amendment. Plaintiff later dropped these claims as the EAHCA was intended as the exclusive remedy for vindicating the rights of handicapped children to a free appropriate education. When plaintiff's filed their second amended complaint, they sought to include a claim pursuant to the due process clause for $25,000 in damages. I declined to grant leave to amend to add this claim. See order, November 18, 1985.

Education Program ("I.E.P.") prepared by Central Bucks School District was inappropriate, reimbursement for tuition at the Landmark School for the 1983-1984 school year and part of the 1984-1985 school year, and an order that the appropriate placement for the 1986-1987 school year is the Landmark School. Plaintiff also seeks attorney's fees.[2]

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[2]It is not clear from the proposed second amended complaint whether there are two plaintiffs or only one. In several places in the complaint, the term "plaintiffs" is used, but paragraph III.1 of the amended complaint states in pertinent part: "[the plaintiffs are Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child..." From this language it appears that only the father is the plaintiff despite the use of the plural. Therefore, throughout the memorandum opinion I shall refer to only one plaintiff which is consistent with the caption on the original complaint.

After numerous delays caused in part by the change in plaintiff's counsel mid-way through this litigation and the filing of a second amended complaint which raised new procedural issues, a three-day trial of this matter finally commenced on August 11, 1986. Because another school year begins next week, I have tried to expedite resolution of this matter, while still reviewing carefully all of the evidence submitted to me. Cases of this type are always difficult because of the emotional element involved and the fact that the future of a child is in issue.

The Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., provides federal monies to state and local agencies to assist in the education of handicapped children. Receipt of such monies is conditioned on the state's compliance with the

extensive procedures and goals of the Act. To qualify, a state must demonstrate that it "has educational benefit to the handicapped child." Id. at 201. The Court specifically held that the Act does not require that a particular substantive level of education be provided or that the services be sufficient to maximize each child's potential. Id. at 198.

The EAHCA establishes a process through which a parent may challenge the educational program developed by the School District for his or her child. Under the Act, any party aggrieved by the findings and decision of the administrative hearings may file a civil action in federal court. In reviewing the proceedings below, the court "shall receive the records of the administrative proceedings, shall hear

additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relieve as the court determines is appropriate." 20 U.S.C. §1415(e)(2).

1983-1984

The first issue plaintiff presents for me to resolve is whether the I.E.P. for the 1983-1984 school year was appropriate. Application of the standard of review established in §1415(e)(2) is complicated by the procedural history of this case. Plaintiff, Mr. Muth, requested a due process hearing on June 17, 1983, before an I.E.P. for the 1983-1984 school year had been prepared in final form. At the conference on June 17, 1983, the multidisciplinary team advised Mr. Muth of the modifications the team proposed

to make in the plan that had been effect between March and June 1983, i.e. that Alexander be removed from the mainstreaming program and returned to the learning disabilities resource room, but these modifications were not incorporated into an I.E.P. at that time. Upon appeal, the Secretary of Education ordered Central Bucks to prepare a revised I.E.P. to reflect the modifications proposed at the June 17 conference and remanded this case to the Hearing Officer.

At trial, counsel for plaintiff objected to the introduction of any evidence pertaining to the revised 1983-1984 I.E.P., arguing that my review should be limited to the I.E.P. considered by Hearing Officer Trent at the first due process hearing on September 30, 1983. I note that in my memorandum opinion of June 2, 1986,

I held that because of the serious procedural flaws that had occurred in the administrative process, I would treat this case as an appeal from Trent's first decision. Because Trent had ruled that the I.E.P. then in existence was inappropriate, I concluded that the burden of proving that program to be implemented for the 1983-1984 school year was appropriate, properly belonged to defendant Central Bucks. See Town of Burlington v. Dept. of Educ., Com. of Mass., 736 F.2d 773, 794 (1st Cir. 1984). However, the Act contemplates that the administrative hearing record will be supplemented at the time of trial; the issue here is what additional evidence should be received. In resolving this issue, consideration must be given to the fact that my role under §1415(e)(2) is to conduct something more

than a review of the administrative process but less than a full trial de novo. Rowley, 458 U.S. at 205.

Given the procedural history of this case, evidence pertaining to the revised 1983-1984 I.E.P. was properly received into evidence, and I will consider it in determining whether the 1983-1984 I.E.P. was appropriate. I note that after filing his request for a due process hearing, Mr. Muth specifically instructed Central Bucks to refrain from making any further revisions in Alexander's I.E.P.; moreover, under Pennsylvania law, no changes could be made in the I.E.P. pending the outcome of the due process hearing. Therefore, no I.E.P. incorporating the modifications proposed by the multidisciplinary team at the June 17, 1983 conference was prepared until it was ordered by the Secretary of

Education. Yet, the issue here is whether the program Central Bucks intended to implement during the 1983-1984 school year was appropriate. Evidence of what the multidisciplinary team had proposed as early as June 17, 1983 is proper "additional evidence for me to consider in fashioning "appropriate" relief.

In reviewing the administrative record and additional evidence, I must give "due weight" to the administrative proceedings. Rowley, 458 U.S. at 206. Because I have held that my review will commence from the point of Hearing Officer Trent's first decision, plaintiff contends that I should conclude, as did Trent, that the 1983-1984 I.E.P. was inappropriate. However, I am not bound by his decision, and as I have noted, I may consider

appropriate additional evidence when evaluating the program Central Bucks intended to employ for Alexander in the 1983-1984 school year.

Central Bucks introduced Alexander's standardized test results for the years he had been at Central Bucks schools. These test results show that, although Alexander had not progressed as steadily or rapidly as might be desired, he made consistent progress. For instance, between 1980 and 1983, on the Wide Range Achievement Test, his reading score rose from a 2.0 grade equivalent to a 4.9 grade equivalent while his mathematical computation score rose from a 3.5 grade equivalent to a 6.4 grade equivalent. Alexander had clearly benefited from the instruction and special services he had received at Central Bucks between 1980 and 1983.

At trial, Central Bucks presented not only the 1983-1984 revised I.E.P. but also the testimony of Vincent Talerico, the special education teacher who would have had principal responsibility for Alexander's education. For the 1983-1984 school year, the multidisciplinary team recommended that Alexander's mainstreaming be limited to his elective courses and that he be returned to the learning disabilities classroom for his substantive subjects. Vincent Talerico testified that Alexander would have attended classes ranging from 5 to 11 students and that he would have received approximately 60 minutes per day of one-to-one instruction. The material conveyed to him would have tracked that presented in the regular education 8th grade level curriculum. Talerico also testified that he intended to employ a

teaching methodology called visual, auditory and kinesthestic tactile modes (VAKT) to take advantage of Alexander's strengths in the visual area; interestingly, it was precisely this methodology that was employed at the Landmark School during the 1983-1984 school year. Talerico is a certified special education teacher who has extensive experience with teaching children with disabilities like Alexander's.

As the revised I.E.P., C.B. Ex. 12, reflects, Alexander's progress would have been monitored by daily, teacher observation, grading of daily assignments, and frequent in-class testing. In addition to the attention given to Alexander's academic needs, Central Bucks was cognizant of Alexander's need to interact with regular education students; therefore,

Alexander would have been mainstreamed for art, music, physical education and lunch. Such mainstreaming is consistent with the preference set forth in the Act for the least restrictive alternative for the handicapped child. §1412(5).[3]

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[3]Section 1412(5) states in pertinent part:

> The State has established (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special education classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, ...

Psychological counseling would also have been available for Alexander. During the previous year, 1982-1983, Alexander had met with or otherwise communicated with Elizabeth Fallon, a certified school psychologist, approximately forty times. This counseling was intended to help Alexander cope with not only any frustrations he developed in the classroom but also problems he faced at home. All of the experts who testified at trial identified Alexander's lack of motivation as a key stumbling block to his academic progress. Counseling such as that Central Bucks proposed was to enable Alexander to concentrate on his academic studies.

Hearing Officer Trent, in his decision of October 31, 1984, concluded that the mainstreaming program was not appropriate for Alexander's needs, and

he recommended that a more restrictive educational setting be explored. The multidisciplinary team had reached the same conclusion by June 17, 1983. Trent also recommended that Alexander's significant auditory perceptual dysfunction be translated into instructional strategies and classroom activities; this recommendation would have been followed by the school through the VAKT methodology Talerico intended to use. Finally, Trent recommended that Alexander's potential for performance in the gifted range be developed. In response, Central Bucks stated that upon enrollment Alexander would be evaluated for eligibility in the gifted program. Trent did not recommend placement at a private school.

Considering the conclusions and recommendations of Hearing Officer Trent, the additional evidence

presented by Central Bucks, the progress Alexander had made at Central Bucks between 1980 and 1983, and the program Central Bucks was prepared to implement based on the recommendations of the multidisciplinary team at the June 17, 1983 conference, I conclude that if it had been implemented, the program Central Bucks was prepared to provide for Alexander would have afforded him an appropriate education. Central Bucks would have provided personalized instruction with sufficient support services to permit Alexander "to benefit educationally from that instruction." Rowley, 458 U.S. at 203.

Procedural Flaws

I must now consider what effect, if any, the procedural flaws which I identified in my memorandum opinion of

June 2, 1986 have on the appropriateness of the I.E.P. which Central Bucks proposed for the 1983-1984 school year. As I noted in my earlier memorandum opinion, the failure of the school district and the Commonwealth to comply with the procedural requirements of the EAHCA are certainly factors for me to consider in determining what relief is appropriate.

In Rowley v. Bd. of Education, 458 U.S. 176 (1982), the Court posed two questions which must be addressed in all actions filed challenging a state administrative process: First, has the State complied with the procedures set forth in the Act, and second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Because there was really no question that the state in Rowley had complied with the procedural requirements of the Act, the Rowley court did not address the issue of what relief is appropriate when specific procedural violations have been identified. However, the Court did emphasize the importance of the procedural safeguards built into the Act. "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§1415(a)-(d), as it did upon the measurement of the resulting I.E.P. against a substantive standard." Rowley, 458 U.S. at 205-06.

In Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996, 2003

(1985), the Court, holding that tuition reimbursement for private school placement may be appropriate, emphasized that a district court has broad discretion in fashioning the relief appropriate to give effect to the purposes of the Act. In this case, the procedural violations identified resulted in the due process procedure dragging on for more than one year. Mr. Muth filed his request for a due process hearing on June 17, 1983. A final administrative ruling was not made until the Secretary of Education adopted Hearing Officer Trent's second decision on October 24, 1984, more than a year and four months later.

The regulations implementing the EAHCA provide strict time limitations for the administrative due process procedure. 34 C.F.R. §300.512.

First, the due process hearing officer's decision is due not more than 45 days after the hearing. Second, the state educational agency shall ensure that "not later than 30 days after the receipt of a request for a review: (1) a final decision is reached in the review." Clearly, no final decision was reached within the 30 days. Rather, the Secretary of Education remanded for further development of the I.E.P., and the due process procedure essentially began all over. Because of these delays, Mr. Muth did not receive a final determination as to the propriety of the proposed I.E.P. within the time limits set by the Act; he never agreed to any extension of time, and there is no indication in the record that either party formally asked for an extension of time.

Mr. Muth's right to have a promptly review of he (sic) program proposed for his son was therefore negated. Moreover, as I noted in any memorandum opinion of June 2, 1986, there is no provision in the Act for the Secretary of Education to remand a case after an appeal is filed. He or she must make an independent decision based upon the record developed at the due process hearing and any additional evidence received. 34 C.F.R. §300.510(b). This decision is to be made promptly so that the parent may proceed to judicial review if appropriate. Furthermore, as I concluded in my June 2, 1986 memorandum, it appears that under the Pennsylvania administrative scheme, the initial due process hearing was conducted at the state level. Given this fact, no appeal to the Secretary of Education may properly be taken.

Therefore, the decision of Trent on October 31, 1983 should have been the final step before judicial review. The question raised is whether the year long delay resulting from the procedural flaws in the state administrative process caused plaintiff any harm for which a remedy is appropriate.

Central Bucks argued that because Mr. Muth had decided before the June 17, 1983 I.E.P. conference to send his son to Landmark School for the 1983-1984 school year, as evidenced by the application Landmark received on June 14, 1986, plaintiff was not harmed in any fashion by the procedural flaws which I have identified. However, under the Court's analysis in Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996 (1985), it is clear that a parent has the right to remove his or her child from public school in favor of

private school placement pending the outcome of the review of the contested I.E.P. Admittedly, the parent acts at his own financial risk, Burlington, 105 S.Ct. 15 2005; however, no inferences adverse to the father can be drawn from the fact that he withdrew Alexander from Central Bucks and placed him at Landmark. He remained entitled to an expeditious and proper resolution of his challenge to the I.E.P.

As the Court in Rowley emphasized repeatedly the procedural safeguards established in the Act are very important and are to be strictly construed. The system is to provide due process which was not provided in this instance. In Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), the court held that the school officials' failure to provide notice to the parents of their procedural rights under the

EAHCA was adequate grounds for holding that the school failed to provide the student with a free appropriate public education in violation of the Act. Defendants contend that Hall must be distinguished on the grounds that in Hall the court also concluded that the I.E.P. proposed by the school district did not provide an appropriate education for the child. In other words, both of the Rowley questions were answered in the negative. While that distinction may warrant an adjustment in the nature or scope of the relief, I do not believe it affects the applicability of the central holding of Hall which is that serious violations of the procedures mandated by the EAHCA may render an I.E.P. inappropriate.

Defendants, relying on Cain v. Yukon Public School, 775 F.2d 15 (10th Cir. 1985) and Scituate School Committee v.

Robert B., 620 F.Supp. 1124 (D. R.I. 1985), contend that the procedural defects which occurred in this case, if any, were purely technical and caused no harm to plaintiff. However, I cannot accept this contention. The flaws in the administrative process applied in this case caused the whole process to drag on for over a year. During that period, Mr. Muth had no opportunity to control or participate in the process which directly affected his son's education. Parental input and participation in the shaping of an education program for a child is the cornerstone of the EAHCA. Accordingly, I conclude that plaintiff is entitled to some sort of relief in this case.

The difficult part is shaping appropriate relief under all of the circumstances. Applying the Rowley questions, the state failed to abide by

the procedures set forth under the Act, but the school was prepared to provide an appropriate education. Under these circumstances, I conclude that the appropriate remedy is reimbursement for one full year of tuition at the Landmark School. If the process had not been delayed by the flaws in the state process, a final decision would have been rendered by the Secretary of Education to (sic) later than December 1983 rather than October 1984. Mr. Muth would then have known that his challenge had failed at least at the state level, and he could have reevaluated his decision to place Alexander at Landmark at his own expense. Therefore, because defendants failed to meet the burden of the first question in Rowley, I will order the reimbursement for the 1983-1984 school year.

Eleventh Amendment

By order dated March 18, 1985, I granted in part the motion for summary judgment filed by defendant Robert C. Wilburn, then Secretary of Education, on the grounds that the eleventh amendment barred plaintiff's claim for tuition reimbursement against the Commonwealth. I noted that the claim was really one against the Commonwealth rather than Secretary Wilburn and because it was a claim for retrospective money damages, it was barred under the principles of Edelman v. Young, 415 U.S. 651 (1974).

Since making that ruling, I have had an opportunity to examine some additional cases addressing the eleventh amendment and the EAHCA most notably, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985). Moreover, new counsel has entered the case on

behalf of plaintiff and has raised new and important issues which were not previously addressed, including the very important issue of the procedural flaws which have permeated this case. At the time counsel entered his appearance, prior counsel had stipulated to the dismissal of Secretary Wilburn and the Commonwealth from this action. I was hesitant to permit plaintiff's new counsel to renew the litigation against the state; however, as this case has progressed, I have become convinced that the Secretary and therefore the Commonwealth's presence is necessary to give plaintiff the relief to which he is entitled. After all, it is the Commonwealth which established the system which contravenes federal law. See 22 Pa.Code §13.31 et seq. Therefore, I advised counsel before trial that I would reconsider my ruling

as to the eleventh amendment. To this end, I heard argument from counsel for the Commonwealth and counsel for plaintiff at trial.

The eleventh amendment states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any Foreign state.

In the absence of state consent to suit or Congressional abrogation of sovereign immunity, a state is immune from a suit brought against it by one of its citizens. Hans v. Louisiana, 134 U.S. 1 (1890). A federal court, therefore, is without jurisdiction over actions of this sort. Eleventh amendment immunity generally extends to a state's agencies or departments.

Pennhurst v. Halderman, 52 U.S.L.W. 4155, 4158 (1984). Similarly, the eleventh amendment bars suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 464 (1945).

Plaintiff contends that in passing the EAHCA, Congress acted pursuant to its remedial powers under section 5 of the fourteenth amendment and intended to abrogate the state's immunity under the eleventh amendment. In support of this position, plaintiff relies on David D. v. Dartmouth School Comm't., 775 F.2d 411 (1st Cir. 1985), in which the court held that the Act did effectively abrogate the sovereign immunity of the states. In David D., the state had argued that a federal court could not, given the eleventh amendment, enforce

state substantive law against the state as a matter of federal law. Rejecting this contention in the context of the EAHCA, the David D. court held that Congress had acted pursuant to its fourteenth amendment remedial powers to assure equal protection of the law to handicapped children.

It was in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), that the Court recognized the limitation imposed on the eleventh amendment by the enforcement provisions of §5 of the fourteenth amendment. Holding that the eleventh amendment does not bar a back pay award under Title VII, the Fitzpatrick court emphasized that the eleventh amendment is "necessarily limited by the enforcement provisiors of §5 of the Fourteenth Amendment." "Congress may, in determining what is 'appropriate

legislation' for the purpose of enforcing the provisions of the fourteenth amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Id. Therefore, Congress, when acting pursuant to the fourteenth amendment, may abrogate the states' immunity without the states' consent.

However, the Court, in determining whether Congress has abrogated the states' eleventh amendment immunity, has required "an unequivocal expression of Congressional intent to overturn the constitutionality guaranteed immunity of the several States. (citations omitted)." Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142, 3146 (1985). In Atascadero, the Court held that Congress, in passing the Rehabilitation Act, did not abrogate the eleventh

amendment bar to suit against the states. Before finding hat (sic) federal law overrides the guarantees of the eleventh amendment, courts must be certain of Congress' intent. The Atascadero court found that the Rehabilitation Act provides remedies for violations of §504 by "any recipient of federal assistance." States were not specifically identified, and the Court held that a general authorization for suit is not the unequivocal language necessary to support the abrogation of the eleventh amendment.

Atascadero and the Rehabilitation Act can be distinguished from this case, as shown by David D., (sic) In the preamble to the EAHCA, Congress specifically stated that:

> [I]t is in the national interest that the Federal Government assist the state and local efforts to provide

> programs to meet the needs of handicapped children in order to assure equal protection of the law.

Therefore, unlike in Rehabilitation Act, in the EAHCA, Congress expressly declared that it was acting to assure the equal protection of the law, i.e., that it was acting pursuant to its remedial powers under §5 of the fourteenth amendment. As the David D. court noted, the Supreme Court has already discussed the grounding of the EAHCA in the fourteenth amendment. In Smith v. Robinson, 104 S.Ct. 3457 (1984), the Court held that EAHCA provides the exclusive avenue through which a plaintiff may assert a claim to a free appropriate public education as guaranteed by the equal protection clause.

The conclusion that Congress intended to abrogate the eleventh amendment immunity and subject states to suit in federal court is also supported by the very nature of the Act itself. The Education for All Handicapped Children Act is necessarily aimed at the states and their political subdivisions, as they are the entities principally responsible for providing public education. Under the Act, federal monies will be allocated to a state to assist it in developing and implementing programs for the education of the handicapped. Receipt of this money, however, is conditioned on the state's compliance with the procedural and substantive rights guaranteed by the Act. To qualify for assistance under the Act, a state must demonstrate that the state has in effect a policy that

assures all handicapped children the right to a free appropriate public education. See 20 U.S.C. §1412 et seq. The Act also establishes a detailed set of procedural safeguards through which handicapped children and their parents may enforce their right to a free appropriate public education. Clearly, Congress intended that children and their parents could sue states which failed to provide a free appropriate public education; section 1415(e)(2) specifically provides that "any party aggrieved by the findings and made under subsection (b)... shall have the right to bring a civil action with respect to the complaint pressed pursuant to this section... in a district court of the United States..."

I am convinced that the court's conclusion in David D., is correct.

I am mindful of the decisions cited by defendant Smith which reach a different conclusion, e.g. Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), but I am unpersuaded by the reasoning used therein. Accordingly, I will reverse my prior ruling and hold that plaintiff's claims for tuition reimbursement are not barred by the eleventh amendment.

1986-1987

In his second amended complaint, plaintiff seeks an order requiring defendants Central Bucks, Newman, and Smith to place Alexander at the Landmark School for the 1986-1987 school year. Plaintiff argues that this is the only "appropriate" placement for Alexander.

Because the issue of what is appropriate for the 1986-1987 school year was placed directly in issue by plaintiff and because Alexander has not attended Central Bucks schools since the 1982-1983 school year and therefore Central Bucks had no current I.E.P. for him, I requested the school district to prepare an I.E.P. for the 1986-1987 school year. Central Bucks presented the proposed I.E.P. at trial along with the testimony of Dr. Robert Laws and Bruce Taylor, who were involved in its preparation. In response, plaintiff presented the testimony of Dr. William Adamson and Karl Pulkinnen who both testified that Landmark's program would be appropriate for Alexander.

Under the program proposed by Central Bucks for the 1986-1987 school year, Alexander would spend five class periods per day in special resource

classes - devoted to substantive subjects. Emphasis would be given to Alexander's language based problems and use would be made of the VAKT methodology which has been used at the Landmark School. Use would also be made of computer software packages which are designed to assist learning disabled children. Alexander's progress would be monitored by daily teacher observation as well as pre and post testing. Although no formal tutoring program exists at Central Bucks, there would be substantial one-to-one instruction in the classroom setting. Each classroom will have no more than eleven students at a time and one teacher and one aide will be assigned to each room. Counseling, including psychological counseling will be available for Alexander.

In addition to the usual classroom program, Alexander will have a choice between a half day program at a vo-tech school or a half-day full of electives such as art appreciation and music. After meeting with Alexander, Dr. Atkins concluded that Alexander would benefit from a vocational or technical program because it would take advantage of his exceptional nonverbal abilities and interests. In response, Dr. Adamson expressed the view that Alexander needs a more structured program with more supervision than a regular vo-tech program would offer. However, the program at Landmark, which Dr. Adamson recommends, would offer at most pre-vocational classes, which would not offer Alexander the training which may prepare him for post-school life. Alexander would probably be limited to the vocational program because a college

preparatory math course is a prerequisite for any technical courses, and he will not be ready to complete this math course. Nevertheless, I am convinced that he could benefit from a vocational program. Reference was made to some manual dexterity problems which Alexander allegedly has, but no evidence as to the nature of this problem was introduced. Moreover, I note in his reviews from his arts and crafts courses at the Landmark School, Alexander consistently received comments to the effect that fine motor control was one of his strengths. See C.B. 5, Reports of Christina B. Palmer, November 4, 1983; November 16, 1984.

If Alexander chooses not to enroll in the vo-tech school, he will be able to take several electives with students in the regular education program.

As previously noted, mainstreaming is preferred under the EAHCA. Therefore, to the extent possible a learning disabled child is to be given an opportunity to interact with regular education students. If Alexander were to return to the Landmark School, he would be educated only with students who have handicaps similar to his own.

Dr. Adamson and Karl Pulkinnen both testified that in their respective opinions, Alexander should be returned to the Landmark School for the 1986-1986 (sic) school year. Dr. Adamson stressed the need for a highly structured program while Mr. Pulkinnen emphasized the need for an integrated language based program. Although I have no doubt that the program offered at Landmark is excellent and that it may even be the best program for Alexander, I am mindful that the EAHCA does not require the

state or local educational agency to fund the "best" education. The Act requires only that a handicapped child be provided a free appropriate education, i.e., personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Rowley, 458 U.S. at 203. The program Central Bucks has proposed for Alexander for the 1986-1987 school year would provide him with that appropriate education.

Alexander has not attended the Landmark School since March 1985 so my order will not have the effect of pulling him from that program. I am satisfied that Alexander will benefit academically from the program prepared by Central Bucks, and I am convinced that Alexander will benefit from an opportunity to interact with regular

education students at Central Bucks, perhaps in the vo-tech program. Moreover, placement at Central Bucks would give Alexander an opportunity to further develop a relationship with his father which might not be possible at a residential placement in Massachusetts. Accordingly I will decline to order defendants to place and fund Alexander at Landmark School for the 1986-1987 school year.

Attorney's Fees

Plaintiff in his second amended complaint has included a claim for attorney's fees. The Third Circuit has recently made it clear that attorney's fees are not available under the EAHCA. Wexler v. Westfield Bd. of Education, 784 F.2d 176, 182 n. 3 (1986).

Therefore, because plaintiff's claims arise only under the EAHCA, plaintiff's claim for attorney's fees must fail.

Dr. Thomas Newman, Superintendent of Central Bucks School District

Defendant Newman contends that the defense of good faith immunity should absolve him of any liability. Under Harlow v. Fitzgerald, 457 U.S. 800 (1980), officials are shielded from liability for civil damages insofar as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

In this case, the only violation which I have found is the procedural flaws identified in my June 2, 1986 opinion in the administrative procedure as established by the Commonwealth.

Limited to his role as superintendent for the school district charged with providing Alexander with a free appropriate public education, Dr. Newman was bound by the administrative procedures established by the Commonwealth. He had no reason to know that in following the due process procedure set forth in the Pennsylvania Code that he would be violating plaintiff's due process rights. Therefore, Dr. Newman is entitled to receive the benefit of qualified immunity and plaintiff's claim against Dr. Newman should be dismissed.

CONCLUSIONS OF LAW

I make the following conclusions of law:

1. There is subject matter jurisdiction in this court over this action pursuant to the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq*.

2. The Individualized Education Program prepared by Central Bucks for the 1983-1984 school year would have afforded Alexander Muth an appropriate education, but the procedural violations which permeated the due process procedure rendered the I.E.P. inappropriate for 1983-1984.

3. Plaintiff is entitled to reimbursement for tuition at the Landmark School for the 1983-1984 school year.

4. Central Bucks has proposed an appropriate program of education for Alexander Muth for the 1986-1987 school year.

5. Central Bucks will be able to implement the proposed program of education for the 1986-1987 school year.

6. The EACHA abrogates the state's eleventh amendment immunity.

7. Plaintiff is not entitled to recover attorney's fees under the provisions of the Education For All Handicapped Children Act.

8. Dr. Newman is immune from liability in this action under the doctrine of qualified immunity.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.		
MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al.	:	No. 84-2032

ORDER

NOW, August 28, 1986, upon consideration of the evidence presented at trial, the arguments made by counsel, and for the reasons set forth in the accompanying findings of fact, discussion and conclusions of law, IT IS ORDERED that:

1. Defendants Central Bucks and Margaret A. Smith, Secretary of Education, shall reimburse plaintiff for

the tuition at the Landmark School for the 1983-1984 school year.

2. Plaintiff's counsel, within ten days of the date of this order, shall submit an affidavit from an official at the Landmark School affirming what the 1983-1984 tuition was at the Landmark School.

3. The I.E.P. prepared by Central Bucks for the 1986-1987 academic year will afford Alexander with a free appropriate public education.

4. Judgment is entered in favor of plaintiff as to his claim for tuition reimbursement for the 1983-1984 school year.

5. Judgment is entered in favor of defendants as to all other claims.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

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MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

MEMORANDUM AND ORDER

Huyett, J. February 20, 1987

Plaintiff brought suit under the Education for All Handicapped Children's Act (EHCA), 20 U.S.C. §1401 et seq., against the Central Bucks School District and the Secretary of Education of the Commonwealth of Pennsylvania. The original complaint was filed on April 27, 1984, at which time the

plaintiff was represented by Alexander Hemphill, Esq., of the firm of Monteverde, Hemphill, Maschmeyer & Obert. An amended complaint was filed by Mr. Hemphill on March 21, 1985. On May 30, 1985, the court granted Mr. Hemphill's motion to withdraw as counsel for plaintiff. On June 5, 1985, an appearance was entered by Matthew B. Bogin, Esq., of the Washington firm of Bogin and Eig. On July 8, 1985, a second amended complaint was filed.

On June 2, 1986, I granted summary judgment in favor of the plaintiff on one issue only. I found that Pennsylvania's Administrative Procedure used to determine the appropriate education for handicapped minors did not comply with the dictates of the EHCA. However, I declined to determine the appropriate remedy at that time because "I [did] not believe it [was]

appropriate for me to order tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff's son with an appropriate free education."[1]

At trial, plaintiff sought a declaration that the 1983-84 I.E.P. was inappropriate, reimbursement for tuition at the Landmark School for the 1983-1984 school year and part of the 1984-1985 school year, and an order that the appropriate placement for the 1986-1987 school year was the Landmark School. Plaintiff was not successful in showing at trial that either the 1983-1984 or

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[1]The "I.E.P." is the individualized education program plan designed by the School District.

the 1986-87 I.E.P. would fail to provide his son with an appropriate education. Therefore, on August 28, 1986 I entered judgment in favor of the defendants on the substantive challenges to the I.E.P. However, I also noted that the delays caused by the flawed hearing process had deprived plaintiff of the opportunity to reconsider decision to place his son in the Landmark School. I concluded that the procedural violations rendered the I.E.P. inappropriate for the 1983-1984, and that plaintiff was entitled to reimbursement for tuition for that year.

As part of my August 28, 1986 judgment, I denied the plaintiff's request for attorneys' fees on the ground that the EHCA did not provide for such an award. However, the EHCA had been amended on August 5, 1986 to

provide for an award of attorneys' fees to a prevailing party.[2] Handicapped Children's Protection Act, P.L. 99-372. §2, 100 Stat. 796 (1986). The amendment applies to all actions which were pending on July 4, 1984 or brought after July 3, 1983. Id., §5. Accordingly, on October 15, 1986 I granted plaintiff's timely motion to alter and amend my judgment to provide for an award of attorneys' fees on the sole issue on which plaintiff prevailed. I ordered plaintiff's former counsel to submit appropriate documentation of their fees, and held a hearing on December 18, 1986. At that hearing, Jean C. Hemphill, Esq., appearing on behalf of Monteverde,

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[2]The statute expressly bars the court from using any "bonus" or "multiplier" in calculating the fee award.

Hemphill, Maschmeyer & Obert, requested additional time to submit additional substantiation of a claim on behalf of her firm.[3] She was granted an extension to January 22, 1987. The briefing is now complete, and this matter is ripe for decision.

Discussion

The statute provides for an award of attorneys' fees to a "prevailing party." A plaintiff is a prevailing party for attorneys' fees purposes if he succeeds on any significant issue in the litigation which achieves some of the benefit he sought in bringing suit.

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[3]Plaintiff's former counsel, Mr. Hemphill, is now deceased. His firm therefore required additional time to research his files pertaining to this matter.

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In a case involving "distinctly different claims for relief that are based on different facts and legal theories," plaintiff should be awarded attorney's fees only for counsel's work on the successful claim. Id. at 434-35. Where, however, the claims involve a common core of fact or related legal theories, such that the lawsuit cannot be viewed as a series of discrete claims, the court should forcus on the overall relief obtained by the parties. City of Riverside v. Rivera, ____ U.S. _____, 106 S.Ct., 2686, 2691-92 (1986); Hensley, 461 U.S. 424, 435.

The instant case presents a very unusual situation. On the surface, the two claims in this case are completely distinct. The plaintiff prevailed on a

procedural challenge to the due process hearing afforded him by the state.[4] The relevant facts concerned the details of the hearing process, and were unrelated to the substantive merits of the proposed I.E.P. The defendants' liability on this issue was conclusively determined on June 2, 1986. The plaintiff's substantive claims challenged the merits of the 1983-1984 I.E.P. which was the subject of the due process hearing, as well as the 1986-1987 proposed I.E.P. The legal principles and facts applicable to the substantive claim were

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[4]The Commonwealth is required by federal law to provide the parent of a handicapped child with an opportunity for an impartial due process hearing to challenge the educational program devised by the school district. 20 U.S.C. §1415.

entirely distinct from those relating to the procedural claim.

There was, however, one important nexus between the two claims: the remedy sought. Plaintiff sought to be reimbursed for the 1983-1984 tuition paid to Landmark School. Whether awarded on the basis of the substantive challenge to the I.E.P. or the procedural challenge to the hearing process, plaintiff could only be reimbursed one time for the 1983-1984 tuition. Had the plaintiff been awarded reimbursement at the time of my June 2, 1986 order, he would have no claim for any of his costs after that date. However, at the time that plaintiff moved for summary judgment, defendants opposed the award of tuition reimbursement, and it was not clear to me that reimbursement would be

appropriate. I therefore deferred my decision on a remedy for the procedural violation until I was able to determine the appropriateness of the proposed I.E.P.'s.

Thus, the plaintiff was required to litigate the merits of the proposed 1983-1984 I.E.P. in order to win tuition reimbursement for that school year. Because the court in June considered the issues to be interrelated, the plaintiff was forced to incur additional attorney's fees. It would be unfair to penalize the plaintiff by applying hindsight to determine that the two issues had no common nexus of fact or law. These additional hours spent litigating the merits of the 1983-1984 I.E.P. were not only reasonable, but were required by the court.

2. Claim of Bogin & Eig.

It is for these reasons that I find that former counsel Matthew Bogin is entitled to an award of reasonable fees for all hours spent by him on the motion for summary judgment[5] and, in addition, to an award of fees for that time spent after June 2 in litigating the merits of the 1983-1984 I.E.P. I emphasize that the basis for awarding the latter fees is not because plaintiff succeeded on the merits of that issue, but because the court had initially determined that an evidentiary record was necessary before the court could determine the appropriate remedy for the procedural violations.

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[5]Defendants agree that this includes all reasonable fees up to and including June 2, 1986.

Defendants do not challenge the hourly rates claimed by Mr. Bogin ($125)and his associate, Beth Goodman ($75). I find these rates to be reasonable.

Of the time spent by Mr. Bogin and Ms. Goodman up to June 2, the only item challenged by the defendants is Mr. Bogin's travel time to and from Philadelphia. Defendants argue that they should not be penalized because plaintiff chose out-of-state counsel. I have considered this issue, and I find that Mr. Bogin is a specialist in the field of special education law, and that plaintiff was reasonable in seeking counsel outside of Philadelphia. I will therefore allow the claim for travel time.

Of the time spent by Bogin and Eig after June 2, I reject, for the reasons already stated, defendants' blanket

challenge to an award of attorney's fees. However, because counsel is not able to separate the time spent on the 1983-1984 and 1985-1986 I.E.P.'s, counsel asks me to award 50% of the time spent after June 2.[6] I find this amount to be reasonable. I therefore award the firm of Bogin & Eig attorney's fees in the amount of $10,036.87.[7]

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[6]In the Declaration of Matthew Bogin, I was asked to award fees for 75% of the time spent. However, this request was modified at the hearing held on December 18, 1986.

[7]This total represents: for Matthew Bogin, 25 hours prior to June 2, 1986 and 50.875 hours after that date; for Beth Goodman, 14.55 hours prior to June 2, 1986 and 1.15 hours after that date. I note services rendered on August 5, 1986 by "MJE", billed at $90.00 per hour. This individual is not further identified in the declaration of Matthew Bogin, and I will not award fees for this service.

I will also award plaintiff all costs incurred by Bogin and Eig up to and including June 2, 1986 with the exception of disbursements for "law clerk time." At the hearing on this issue, Mr. Bogin was asked to establish the hourly rate for law clerks and to provide greater detail as to their function. By letter dated February 6, 1987, he has advised the court that this time was billed at $15.00 per hour. This rate shows over 127 hours spent by law clerks on this matter. Mr. Bogin's letter summarizes the duties of the law clerks, who apparently read and summarized transcripts and school records, and did some legal research. However, without further substantiation, I cannot find that plaintiff has met his burden of proof as to these substantial costs. See Hensley, 461 U.S. 424, 433.

I will award plaintiff 50% of the costs incurred after June 2, 1986, for a total of $1071.79.[8]

3. Claim of Monteverde, Hemphill, Maschmeyer & Obert

Ms. Hemphill argues in her memorandum that her firm should also be awarded fees. She argues that the procedural claim on which plaintiff ultimately succeeded was raised in the first amended complaint, filed by Mr. Hemphill on March 21, 1985. See First Amended Complaint, Paragraphs 22-27, 30-33. However, while the first amended complaint did allege facts which were relevant to the procedural claim, the amended complaint as a whole did not

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[8]This total represents $223.45 in costs prior to June 2, 1986 and $848.34 after that date.

assert a claim for the procedural violation. Although paragraphs 22 and 23 do contain an allegation that the remand of the matter to the hearing officer was in violation of 20 U.S.C. §1415, this matter was never pursued by Mr. Hemphill. This issue was not included in the stipulation of issues for trial signed by Mr. Hemphill. Finally, on November 18, 1985, I granted plaintiff's motion to file a second amended complaint. The motion sought to amend the complaint in order to "raise certain issues not previously raised" concerning "due process violations committed by the Secretary of Education... through his participation in the state level hearing, and the exorbitant amount of time spent on the administrative proceedings, both in direct violation of The Education for All Handicapped Children Act ("EHA")."

At page 6 of my memorandum, I noted that:

> In count two of the second amended complaint, plaintiff contends that the delays in the due process procedure in this case violate his rights under the EHCA, and the due process clause of the fourteenth amendment. Plaintiff has never raised this issue, and to raise this issue at this time will necessitate extensive additional discovery and preparation by all of the defendants. Nevertheless, I will permit plaintiff to add a claim based on the EHCA.

Mr. Hemphill did not raise the procedural claim on which plaintiff prevailed; plaintiff never succeeded on the substantive claims raised in the original and first amended complaints. Therefore, the work done by Mr. Hemphill was not related to the claim on which plaintiff ultimately did succeed. The request of Monteverde, Hemphill, Maschmeyer and Obert for attorney's fees is therefore denied.

4. Liability of the School District

Defendant Central Bucks School District has argued that it should not be liable for attorney's fees because the hearing process in question was one which was established by the Commonwealth and which the School District was required to follow.

Of course, the same argument would apply to the judgment which was entered against both the Commonwealth and the School District. It would be inconsistent for this court to enter judgment against both defendants, and yet award attorney's fees against only the Commonwealth.

The judgment against the School District has been appealed to the Third Circuit. If judgment against either defendant is reversed, it follows that

the award of attorney's fees against that defendant will not stand. However, absent a reversal by the Third Circuit, attorney's fees and costs totalling $11,108.66 are awarded against both defendants.

An appropriate order is attached.

/S/Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, et al. : No. 84-2032

ORDER

HUYETT, J. February 20, 1987

Upon consideration of the declaration of Matthew B. Bogin, the supplementary memorandum of Matthew B. Bogin, the objections of defendants Newman and Central Bucks School District to Affidavit of Matthew Bogin, defendant Smith's response to Matthew Bogin's request, the motion of Monteverde, Hemphill, Maschmeyer & Obert for counsel fees, the memorandum in support of that

motion, the memorandum of defendants Central Bucks School District and Newman contra motion of Monteverde, Hemphill, Maschmeyer and Obert, the supplemental memorandum of Russell A. Muth, Jr., and the letter of Matthew B. Bogin dated February 6, 1987, and for the reasons stated in the attached memorandum, IT IS ORDERED that the following fees and expenses are awarded to be paid by defendants Margaret A. Smith, Central Bucks School District, and Dr. Thomas L. Newman:

To:

Bogin & Eig, Esqs.	
fee, per attached	
memorandum	$10,036.87
expenses	1,071.79
	$11,108.66

No fees or expenses are awarded to Monteverde, Hemphill, Maschmeyer and Obert, Esqs.

IT IS SO ORDERED.

/S/Daniel H. Huyett, 3rd, Judge